(18)

No. 94-929-ATX Title: United States, Appellant
Status: GRANTED v.
Davida Johnson, et al.

Docketed: Court: United States District Court for the
November 21, 1994 Southern District of Georgia

Vide: Counsel for appellant: Solicitor General
94-631
94-797 Counsel for appellee: Bowers,Michael J., Walbert,David F., Parks,A. Lee, Brumby,Sewell, McDonald,Laughlin, Nicholson,Sam G., Jones,Elaine R., Weber,Gerald R., Dye,A. Rowland

NOTE: Amended notice of appeal filed 092294

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1994	C	Application (A94-203) for a stay of USDC order pending appeal, submitted to Justice Kennedy.
2	Sep 22 1994		Application (A94-203) referred to the Court by Justice Kennedy.
3	Sep 23 1994		(A94-203) The applications for stay presented to Justice Kennedy and by him referred to the Court are granted and it is ordered that the judgment of the United States District Court for the Southern District of Georgia, Civil Aciton No. 194-008, dated September 12, 1994, is stayed pending the timely filing of statements as to jurisdiction in this Court. Should such statements be so timely filed, this order shall remain in effect pending this Court's action on the appeals. If the judgment should be affirmed, or the appeals dismissed, this stay shall expire automatically. In the event jurisdiction is noted, or postponed, this order shall remain in effect pending the sending down of the judgment of this Court. Justice Scalia took no part in the consideration or decision of these applications. (also Application Nos. A-190 & A-200)
4	Nov 21 1994	G	Statement as to jurisdiction filed.
6	Dec 8 1994	N	Motion of appellees for joint preliminary consideration of related cases and expedited decision filed.
5	Dec 21 1994		Motion of appellees Davida Johnson, et al. to affirm filed. VIDED.
7	Jan 3 1995		REDISTRIBUTED. January 6, 1995 (Page 41)
8	Jan 6 1995		PROBABLE JURISDICTION NOTED. **********
9	Feb 2 1995		SET FOR ARGUMENT WEDNESDAY, APRIL 19, 1995. (2ND CASE)
10	Feb 21 1995		Brief amicus curiae of Congressioinal Black Caucus filed. VIDED.
11	Feb 21 1995	G	Motion of Georgia Association of Black Elected Officials for leave to file a brief as amicus curiae filed.
12	Feb 21 1995		Brief amici curiae of Democratic National Committee, et al. filed. VIDED.
13	Feb 21 1995		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.

3 pp

No. 94-929-ATX

Entry	Date	Note	Proceedings and Orders
15	Feb 21 1995		Order extending time to file brief of appellant on the merits until February 23, 1995.
16	Feb 21 1995		Joint appendix filed. VIDED.
17	Feb 21 1995		Brief amici curiae of Texas, et al. filed. VIDED.
20	Feb 21 1995	G	Motion of National Voting Rights Institute for leave to file a brief as amicus curiae filed.
19	Feb 23 1995	G	Motion of Mexican American Legal Defense and Educational Fund, et al. for leave to file a brief as amici curiae filed.
41	Feb 23 1995		Brief of appellant United States filed.
18	Feb 24 1995		CIRCULATED.
21	Mar 6 1995		Motion of Georgia Association of Black Elected Officials for leave to file a brief as amicus curiae GRANTED.
22	Mar 6 1995		Motion of National Voting Rights Institute for leave to file a brief as amicus curiae GRANTED.
23	Mar 7 1995		Record filed.
		*	Original record proceedings United States District Court for the Southern District of Georgia (2 BOXES)
24	Mar 8 1995	D	Motion of the Solicitor General for divided argument filed.
25	Mar 8 1995	G	Motion of appellants Zell Miller, et al. for divided argument filed.
26	Mar 8 1995	D	Motion of appellants Lucious Abrams, Jr., et al. for divided argument and for additional time for oral argument filed.
27	Mar 13 1995		Opposition of appellees to motions of appellants for divided argument and for additional time for oral argument filed.
28	Mar 15 1995		Opposition by appellants Miller, et al. to motions for divided argument and for additional time for oral argument filed.
45	Mar 15 1995	X	Brief amici curiae of Ruth O. Shaw, et al. filed. VIDED.
29	Mar 20 1995		Motion of Mexican American Legal Defense and Educational Fund, et al. for leave to file a brief as amici curiae GRANTED.
30	Mar 20 1995		Motion of the Solicitor General for divided argument DENIED.
31	Mar 20 1995		Motion of appellants Lucious Abrams, Jr., et al. for divided argument and for additional time for oral argument DENIED.
32	Mar 20 1995		Motion of appellants Zell Miller, et al. for divided argument GRANTED. to be divided as follows: appellants Zell Miller, et al. - 20 minutes; United States - 10 minutes. The request for additional time for oral argument is denied.
37	Mar 21 1995	X	Brief amicus curiae of A.J. Pate filed. VIDED.
34	Mar 27 1995	X	Brief of appellees Davida Johnson, et al. filed. VIDED.
35	Mar 27 1995	X	Brief amicus curiae of Anti-Defamation League filed. VIDED.
36	Mar 27 1995	X	Brief amici curiae of Washington Legal Foundation filed. VIDED.
38	Mar 30 1995	D	Motion of appellants Lucious Abrams, Jr., et al. for

ntry	Date	Note	Proceedings and Orders
			reconsideration of order denying motion for additional time for oral argument filed.
39	Apr 5 1995		Opposition of appellees to motion of appellants Lucious Abrams, Jr., et al. for reconsideration of order filed.
40	Apr 5 1995		Response of Zell Miller, et al. to motion for reconsideration filed.
42	Apr 12 1995	X	Reply brief of appellant United States filed. VIDED.
43	Apr 17 1995		Motion of appellants Lucious Abrams, Jr., et al. for reconsideration of order denying motion for additional time for oral argument DENIED.
44	Apr 19 1995		ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a districting plan is always subject to strict scrutiny if race has been a substantial or motivating factor in its creation.

2. Whether the boundaries of Georgia's Eleventh Congressional District are so bizarre on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether the State's creation of District Eleven is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs below were Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of the State of Georgia. Intervenor-defendants were Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitution provision involved	2
Statement	2
The questions presented are substantial	12
Conclusion	20
Appendix A	1a
Appendix B	103a
Appendix C	105a
Appendix D	107a

TABLE OF AUTHORITIES

Cases:

Beer v. *United States*, 425 U.S. 130 (1976) 9
Busbee v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) 3
Hays v. *Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), vacated and remanded on other grounds, 114 S. Ct. 2731 (1994) 7
Shaw v. *Reno*, 113 S. Ct. 2816 (1993) 2, 6, 13, 14, 16
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 10, 17

Constitution, statutes, regulations and rule:

U.S. Const. Amend. XIV (Equal Protection Clause) 2, 5
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... 8, 16, 17, 18
§ 5, 42 U.S.C. 1973c ..... *passim*
28 U.S.C. 1253 1
28 C.F.R.:
Section 51.3 4
Section 51.59 9
Sup. Ct. R. 18.1 1

Miscellaneous:

52 Fed. Reg. 490 (1987) 9

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App., *infra*, 1a-102a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on September 12, 1994. The United States filed a notice of appeal on September 20, 1994 (App., *infra*, 105a-106a), and an amended notice of appeal on September 22, 1994 (App., *infra*, 107a-108a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

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[1] The first notice of appeal did not specify the statute under which the appeal was taken. See Sup. Ct. R. 18.1. The amended notice of appeal specified that the appeal was being taken pursuant to 28 U.S.C. 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case concerns a constitutional challenge to the configuration of the Eleventh District in Georgia's 1992 congressional redistricting plan. A three-judge district court held that the configuration of the Eleventh District violates the Equal Protection Clause of the Fourteenth Amendment, as construed in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). The United States, three of the four state officials sued in their official capacities, and the private defendant-intervenors have appealed from that judgment.

1. The population of the State of Georgia is approximately 27% African-American. Georgia has an extensive history of discrimination in voting. The district court took judicial notice of the fact that "Georgia's history on voting rights includes discrimination against black citizens." App., *infra*, 103a. The court explained that "[f]rom the state's first Constitution—which barred blacks from voting altogether—through recent times, the state has employed various means of destroying or diluting black voting strentgh." *Id.* at 103a-104a. Those means, which the court found had been enacted as late as 1958, included literacy tests, property requirements, white-only primaries, and the county unit system. The court specifically noted that "[c]ongressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential." *Id.* at 104a. That

was accomplished by "packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts." *Ibid.*

From Reconstruction until the 1980's, black voters were not in the majority in any of the State's congressional districts. Following the 1970 census, the Attorney General interposed a Section 5 objection to Georgia's congressional redistricting plan, which fragmented African-American population concentrations in the Atlanta area. Joint Statement of Undisputed Facts 48-49. The State then adopted, and the Attorney General precleared, a revised plan that remedied the fragmentation, but that did not have an African-American majority district. See *Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

Following the 1980 census, the State drew a plan that included one majority African-American district in the Atlanta area, but that nonetheless unnecessarily fragmented the African-American community in that area. The Attorney General again interposed a Section 5 objection, and the State sought preclearance from the United States District Court for the District of Columbia. The court denied preclearance on the ground that the plan had "a discriminatory purpose in violation of Section 5." 549 F. Supp. at 517. The court held that the plan "implemented a scheme designed to minimize black voting strength to the extent possible." *Id.* at 518. The court ultimately precleared a revised plan. *Id.* at 520.

2. Following the 1990 census, the State of Georgia was entitled to 11 congressional seats, a gain of 1 seat since 1980. In a special legislative session in 1991, the state legislature passed a redistricting plan that

included two majority-minority districts: the Eleventh, in east-central Georgia, and the Fifth, in the Atlanta area. In addition, the plan included a third district—the Second District in the southwest part of the State—in which African-Americans comprised approximately 36% of the voting age population. App., *infra*, 12a-14a.

The plan was submitted to the Justice Department for preclearance. Acting on behalf of the Attorney General (see 28 C.F.R. 51.3), the Assistant Attorney General for Civil Rights interposed an objection under Section 5. He based the objection on the fact that the State had failed to carry its burden of demonstrating that the plan did not "have the purpose or * * * the effect of denying or abridging the right to vote on account of race." See App., *infra*, 15a. He noted a "concern" that the Georgia legislative leadership had decided to "limit" black voting potential to two majority-minority districts, and explained that the plan did not take into account concentrations of African-Americans who lived in southwest Georgia. See *id.* at 14a.

The state Senate then passed a plan with three majority African-American districts that would have moved some areas from the Eleventh District to the Second District and would have extended the Eleventh District to Savannah, thereby including Savannah's concentrations of African-Americans. App., *infra*, 16a. The state House of Representatives, however, refused to adopt that approach, and instead insisted upon a plan that slightly modified the Eleventh and Fifth Districts and that increased the percentage of voting age population that was African-American in the Second District to 45%. *Id.* at 16a & n.9. The Assistant Attorney General again interposed an ob-

jection under Section 5. He explained that "no legitimate reason has been suggested" to explain why the House declined to enact the Senate plan, and that the plan as submitted therefore continued "the exclusion of the second largest concentration of blacks in the state from a majority black Congressional District." *Id.* at 17a.

The State legislature then enacted a new plan that was similar to the plan the state Senate had previously passed. It responded to the Section 5 objection by increasing the African-American voting age population in the Second District to 52%. App., *infra*, 21a & n.12. As compared with the plan the State had previously enacted, this plan moved some areas from the Eleventh to the Second District and extended the Eleventh District to Savannah to include that city's concentrations of African-American citizens. The Assistant Attorney General determined not to interpose an objection, and the plan took effect. *Id.* at 22a-23a.

2. In January, 1994, five white residents of the Eleventh District filed suit in the United States District Court for the Southern District of Georgia, alleging that the Eleventh District segregated voters on the basis of race in violation of the Equal Protection Clause. A three-judge court was convened. The United States and a number of citizens of Georgia intervened in support of the defendants. A trial took place on July 21-28, 1994. The three-judge court ruled that the configuration of the Eleventh District violated the Fourteenth Amendment.

a. The court narrated in some detail the history of the State's post-1990 redistricting and extensively characterized the Section 5 review of the various state plans by the Department of Justice. App., *infra*, 5a-

27a. The court explained that, from the beginning of the process, a plan with three majority African-American districts had been developed by the American Civil Liberties Union (ACLU) on behalf of the Black Caucus of the General Assembly and presented to the state legislature. *Id.* at 6a. That plan included the extension of the Eleventh District to Savannah and the inclusion of portions of Macon in the Second District. Those elements were employed by the State in the plan that was finally enacted and precleared, although the final plan differed in other important ways from the ACLU's plan. *Id.* at 6a-9a, 101a (map). The court also stated that the ACLU had repeatedly brought its plan to the attention of the Department of Justice in the course of the Section 5 preclearance process; that the ACLU had used that plan to argue to the Department of Justice that the State's first two redistricting plans should not be precleared; and that the Department of Justice's "criteria for and opinions of Georgia's submissions were greatly influenced by [the ACLU's attorney] and her agenda." *Id.* at 10a. The court stated that the State did not seek a Section 5 declaratory judgment because of fear that it would lose such a case as it had lost *Busbee* v. *Smith* ten years earlier, and because such a suit could have been expensive and would have taken some time to litigate. App., *infra*, 20a-21a n.11.

With respect to the merits of plaintiffs' claim, the court held that the Eleventh District is subject to strict scrutiny. In *Shaw* v. *Reno*, *supra*, this Court held that a district is subject to strict scrutiny if it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S. Ct. at 2824. In the district court's view, that language does not suggest

that "[t]he shape of the district is * * * a 'threshold' inquiry preceding an exploration of the motives of the legislature." App., *infra*, 29a. Instead, the shape is simply " 'objective' evidence of the legislature's intent in drafting that district," *ibid.*; "[t]he purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards," *id.* at 41a. Therefore, a plaintiff can make out a *Shaw* claim either through proof concerning "a district's shape as circumstantial evidence of legislative intent," *id.* at 40a, or through "direct testimony of those involved with the [redistricting] process" concerning "the legislature's intent," *ibid.*

Examining the precise nature of what in its view was the forbidden legislative motive, the district court held that strict scrutiny must be applied if "race was the *substantial or motivating* consideration in [its] creation"—a criterion the court explained as requiring that race be "*the overriding, predominant force* determining the lines of the district." App., *infra*, 35a. In reaching that conclusion, the court rejected the view of the district court in *Hays* v. *Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), vacated and remanded on other grounds, 114 S. Ct. 2731 (1994), that race "need only have been a recognizable factor —not the sole or dominant one—before a redistricting plan is constitutionally suspect." App., *infra*, 33a. The court explained that adoption of that standard would lead to jurisdictions covered under Section 5 of the Voting Rights Act being "buried under *Shaw* litigation every time [they] pass[] a redistricting plan." App., *infra*, 38a-39a. The court also rejected the view that "race must have been the *sole* motivation behind a particular district shape before strict scrutiny is appropriate." *Id.* at 33a. In the court's view, "th[at] standard would be nearly impossible to meet." *Id.* at 39a.

Applying its standard, the district court found that the "indirect" evidence of legislative intent was sufficient to subject the Eleventh District to strict scrutiny, because various portions of the district had irregular boundaries. In particular, the court held that "[t]he extension [of the district] to Savannah is not compact by any credible definition of that term," App., *infra*, 43a; that the Augusta portion reflected a selective inclusion of predominantly African-American census blocks, *id.* at 45a; and that the Eleventh District as a whole split eight of its 22 counties, a result that the court believed to be unnecessary, *id.* at 47a. The court also held that there was sufficient "direct" evidence that the legislature had a suspect racial motive when it drew the Eleventh District. *Id.* at 48a-51a. In particular, the court adverted to the State's admission that its motive in extending the Eleventh District to Savannah was to include additional African-American voters in the District. *Id.* at 48a-50a. The court also referred to evidence that other portions of the district were drawn in an effort to include African-Americans in the district. *Id.* at 49a.

The district court then applied strict scrutiny. The district court held that the only compelling state interest that could potentially justify the Eleventh District was the State's interest in complying with Sections 2 and 5 of the Voting Rights Act. The district court stated that it was assuming the existence of that interest, but the court held that what it viewed as the "narrow tailoring" inquiry was crucial: whether "the district[], as precleared and enacted, [was] genuinely 'reasonably necessary,' that is, narrowly tailored, to comply with the [Voting Rights Act]." App., infra, 60a (citation omitted).

The court held that the district failed that "narrow tailoring" test. In the court's view, the fact that the Department of Justice had refused preclearance of the State's earlier attempts at redistricting did not establish that creating the Eleventh District was necessary to satisfy Section 5 of the Voting Rights Act. Instead, the court held that the plan "will live or die" on the basis of the court's independent determination of "whether Georgia's 1992 congressional redistricting plan was actually required by the [Voting Rights Act] and Supreme Court precedent." App., *infra*, 63a.

With respect to Section 5, the majority determined that although Georgia "did what was minimally 'necessary' to secure preclearance," App., *infra*, 62a, the Department of Justice had erred in refusing to preclear previous plans that did not contain three majority black districts.[2] Under Section 5, Georgia had the burden of demonstrating that its redistricting plan would not have a discriminatory purpose or effect. 42 U.S.C. 1973c. This Court has interpreted the "effects" prong to require a showing that the change was nonretrogressive, see *Beer* v. *United States*, 425 U.S. 130 (1976); the court agreed with

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[2] The court held that the refusal to preclear the earlier Georgia plans was inconsistent with regulations "promulgated by Congress to assist DOJ in properly enforcing the [Voting Rights] Act." App., *infra*, 64a-65a (citing 28 C.F.R. 51.59). The court went on to discuss the regulations in terms of what "Congress intended," App., *infra*, 65a, what "Congress was apparently worried" about, *ibid.*; and how "Congress uses" a particular term in the regulations, *id.* at 66a. The regulations to which the court referred, however, were not enacted by Congress; they were promulgated by the Attorney General. See 52 Fed. Reg. 490 (1987). There is no indication in the court's opinion that it gave any deference to the Attorney General's interpretation of her own regulations.

all parties in this case that the change was non-retrogressive. See App., *infra*, 67a-68a. In the portion of its opinion applying the strict scrutiny standard, the court did not directly address the "purpose" prong of Section 5, on the basis of which the Section 5 objections to Georgia's first two redistricting plans had been interposed. Early in its opinion, however, the court reported that several state officials had not "found any evidence of acts or statements by * * * legislators indicating an intent to discriminate against minority voters." App., *infra*, 13a. The court at that point commented that it "finds no evidence prompting [it] to doubt that conclusion." *Ibid.*

The court also held that the Eleventh District was not required by Section 2 of the Voting Rights Act. App., *infra*, 80a. The court reached that conclusion by applying the preconditions set forth by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). The court held that the district was not sufficiently compact, because its outside perimeter included "hooks, tails and protrusions" in and near densely populated urban areas at its periphery. App., *infra*, 79a. The court also found that racial polarization "exists, but not in alarming quantities"; the court found that from 22% to 38% of white people in the area voted for African-American candidates, while 20% to 23% of African-Americans in the area voted for white candidates. *Id.* at 82a. The court also found, based on its independent analysis of the evidence before it, that the Eleventh District included more African-Americans of voting age (60.36%) than would have been necessary to satisfy Section 2 in any event. App., *infra*, 82a-87a.

b. Circuit Judge Edmondson dissented. In Judge Edmondson's view, "[h]ighly irregular shape—the appearance of the district—is the critical element of"

the cause of action recognized by this Court in *Shaw*. App., *infra*, 93a. Accordingly, he rejected the court's holding that a district's "shape is merely one piece of circumstantial evidence proving the legislature's intentional use of race." *Id.* at 94a. He noted that *Shaw*'s "highly-irregular-appearance standard * * * avoids the unreliability of after-the-fact statements by legislators and also avoids the necessity of federal judges probing and intruding on state officers' thoughts * * * to 'learn' the state's true intent." *Id.* at 94a n.2.

Judge Edmondson found that the Eleventh District was not "bizarre or highly irregular within the meaning of *Shaw*." App., *infra*, 96a. He noted that the size of the district, the length of its borders, and its position within the State were not out of the ordinary. *Id.* at 96a-98a. Moreover, he noted that the Eleventh District's boundaries follow existing state, county, and city borders to approximately the same extent (71%) as the average for the State's other congressional districts; that "Georgia's congressional districts have no tradition of being neat, geometric shapes"; that portions of other districts are more irregular than the particular portions of the Eleventh District criticized by the majority; and that other districts in Georgia's current plan, as well as in past plans, split counties. *Id.* at 98a-99a. He concluded that the district "is not so bizarre on its face to justify, pursuant to the Constitution, a more searching inquiry," and that the district court accordingly should not "interfere with the reapportionment plan that resulted from Georgia's political process." *Id.* at 100a.

3. The district court enjoined the completion of this year's election cycle in the Eleventh District and

stated that it would hold a remedial hearing after receiving submissions from interested parties. App., *infra*, 89a. The Governor and two of the other state defendants, the private intervenor-defendants, and the United States moved for a stay in this Court. On September 23, 1994, this Court granted the stay pending the filing and dispositon of the appeals in this case. 115 S. Ct. 36.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Because this case presents questions that are quite similar to those presented in *United States* v. *Hays*, No. 94-558, it would be appropriate for the Court to hold this appeal pending its disposition of *Hays*.[3] Both cases raise the question whether a districting plan is always subject to strict scrutiny if race has been a substantial or motivating factor in its creation. In addition, the configuration of the district challenged in this case is similar to the configuration of the district challenged in *Hays*: isolated portions of both districts are oddly shaped, but the districts viewed as a whole do not represent extraordinary departures from the States' ordinary districting practices. As a result, this Court's determinations in *Hays* concerning the circumstances under which a districting plan should be subject to strict scrutiny are likely to illuminate the corresponding question in this case. Similarly, if the Court determines that strict scrutiny must be applied in *Hays*, the determination of whether the challenged district in that case is nonetheless constitutional should shed light on the corresponding question

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[3] We are providing all parties with a copy of our jurisdictional statement in *Hays*.

in this case. We have already filed a jurisdictional statement in *Hays* asking that this Court note probable jurisdiction and give plenary consideration to that case. For that reason, and because this case is likely to be ripe for this Court's consideration later than *Hays*, holding this case for the Court's disposition of *Hays* would be appropriate.

1. The first question presented in *Hays* is whether the intentional creation of a majority-minority district is always subject to strict scrutiny. In our view, it is not. See 94-558 J.S. 10-12. The Court's resolution of that question is likely to exert substantial influence on the similar question in this case.

It was undisputed in both *Hays* and in this case that the State intended to create a majority-minority district, and that race was an important factor to the State in determining the configuration of the districts that were challenged. If this Court agrees with the district court in *Hays* that those facts are sufficient to require strict scrutiny, it would appear that the same conclusion would follow in this case. If, on the other hand, the Court determines that those facts are not alone sufficient to require strict scrutiny, then the analysis in both cases must proceed to a further step.

2. Assuming that strict scrutiny is not necessary merely because a State has intentionally created a majority-minority district, *Hays* presents the further question of what additional circumstances require such scrutiny. In *Shaw* v. *Reno*, this Court held that a district is subject to strict scrutiny if it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S. Ct. at 2824. *Hays*

and this case both present the question of how a district court is to apply that criterion to a district whose boundaries are substantially more regular than those at issue in *Shaw*.

In *Hays*, the district court concluded that the challenged district was subject to strict scrutiny under its interpretation of the *Shaw* standard. The district court relied in part on its finding that the configuration of the district on its face is so bizarre that it can only be understood as an effort to segregate voters. 94-558 J.S. App. 3a. As we explain in our Jurisdictional Statement in *Hays*, that determination is mistaken on the facts of that case. Because the Constitution does not require a State to tailor its districts to any absolute concept of compactness, see *Shaw*, 113 S. Ct. at 2827, the manner in which the State has actually drawn and continues to draw other districts is a proper benchmark for determining whether a majority-minority district is "bizarre." The district challenged in *Hays* resembles other districts Louisiana has drawn in the past and fits comfortably within the State's ordinary districting practices. The presence of oddly shaped boundaries in isolated portions of the district does not require the conclusion that the boundaries of the district, taken as a whole, are "so extremely irregular on [their] face that [the district] rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S. Ct. at 2824. Accordingly, applying the proper standard, the district court should have concluded that the district in *Hays* was not subject to strict scrutiny.

Essentially the same analysis applies to this case. As in *Hays*, the district challenged here fits com-

fortably within the State's ordinary districting practices. As Judge Edmondson noted in dissent, the length of the Eleventh District's borders is "not distinctive" when compared to other Georgia districts. App., *infra*, 96a. The fact that the district spans a large part of the State does not distinguish it from four of the ten other districts in Georgia's current plan. *Ibid.* The Eleventh District is also at or above the Georgia average with respect to the proportion of its boundary that follows existing state, county, and city borders, the proportion of its area that comes from whole counties, and the proportion of counties that it splits. *Id.* at 96a, 98a. Nor are the more irregular portions of the district's boundaries—which, as in Louisiana, are generally limited to isolated portions of the district—unprecedented in current and past Georgia plans. *Id.* at 97a-98a.

Because of the similarities between this case and *Hays*, this Court's decision in *Hays* concerning the proper standard to apply in assessing whether a district is so bizarre as to trigger strict scrutiny is likely to have a significant influence on resolution of the corresponding issue in this case. Moreover, the district courts in both cases committed similar errors in making their findings of "bizarreness." As we explain in *Hays*, the district court in that case rejected the State's argument that strict scrutiny was inapplicable, relying on admissions by state legislators that race in fact played a large role in drawing the challenged district. 94-558 J.S. 15. Similarly, the district court here relied in part on actual legislative intent to reject arguments that the district's configuration is not so "bizarre" as to trigger strict scrutiny. App., *infra*, 48a-51a. In both cases, the

district court's reliance on actual legislative intent is difficult to square with this Court's repeated admonition in *Shaw* that the district must be analyzed "on its face." See 113 S. Ct. at 2824, 2825, 2826, 2828, 2829, 2832. In any event, this Court's determination in *Hays* concerning the proper analyses of a district's physical configuration and of the role, if any, of actual legislative intent are likely to guide the analysis in this case.

3. The analysis of whether the challenged district can survive strict scrutiny is also likely to be similar in the two cases, should that issue be reached. The first question in both cases would be whether the State's asserted interests in drawing an additional majority-minority district were sufficiently compelling to justify the challenged district. In both cases, the primary interests that could be asserted were the need to comply with Section 2 and with the "purpose" prong of Section 5 of the Voting Rights Act, as well as the State's independent interest in ameliorating the effects of racially polarized voting.

In *Hays*, the State argued that it had a reasonable basis for believing that creation of the additional majority-minority district was necessary for compliance with Section 5 of the Voting Rights Act. See 94-558 J.S. App. 7a-8a. The State based that conclusion on the fact that, one year prior to Louisiana's congressional redistricting, the Attorney General had refused to preclear a new districting plan for the 8-member state board of education because it did not include two majority-minority districts. See 94-558 J.S. 2-3. The State also argued that its creation of an additional majority-minority district was justified

by its compelling interest in complying with Section 2 of the Voting Rights Act. See 94-558 J.S. App. 8a-9a. The State asserted that, if it did not include such a district in its plan, it reasonably believed that a plaintiff could make out a prima facie Section 2 case against the State, on the basis of the three preconditions set forth by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). Finally, the State argued that it had an interest, independent of the Voting Rights Act, in ameliorating the effects of past discrimination that affected voting. See 94-558 J.S. App. 9a-10a.

The district court in *Hays* rejected the State's arguments. The court rejected the State's reliance on Section 5 of the Voting Rights Act on the ground that, based on the court's own *de novo* examination of the record, any Section 5 objection lodged by the Attorney General would not have been legally valid. 94-558 J.S. App. 7a-8a & n.3.[4] The court rejected the State's reliance on Section 2 of the Voting Rights Act on the ground that, in its view, the State would not have been subject to liability under Section 2 if it had failed to draw the challenged districts. In particular, the court found that, since the challenged district was not in the court's view sufficiently compact, a plaintiff would not have been able to satisfy the *Gingles* compactness precondition. See 94-558 J.S. App. 8a. The court rejected the State's independent remedial justification on the ground that there were no lingering effects of discrimination that would justify such remedial action. *Id.* at 10a.

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[4] We argued both in *Hays* and in this case that the district court has no authority to engage in independent review of a Section 5 objection lodged by the Attorney General. See 94-558 J.S. 19-20.

With respect to the application of strict scrutiny, the facts of this case are remarkably similar to those in *Hays*, and the analysis applied in *Hays* is likely to govern the analysis in this case. As in *Hays*, the State here relied on previous Section 5 objections by the Attorney General as a basis for its conclusion that it was required by Section 5 of the Voting Rights Act to draw the challenged district. As in *Hays*, the state officials also were aware of facts that led to the conclusion that the failure to create an additional majority-minority district would have permitted a plaintiff to make out a *prima facie* Section 2 case against it.[5] Finally, as in *Hays*, the State here was faced with evidence sufficient to create a strong interest—independent of the Voting Rights Act—in ameliorating the effect that racially polarized voting has had on the opportunity for minority voters to elect the candidates of their choice. Thus, if this Court applies strict scrutiny in *Hays*, the analysis the Court adopts is likely to be applicable as well in this case.

4. In light of the very substantial similarities between this case and *Hays*, we believe that it would be unnecessary for the Court to note probable juris-

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[5] The district courts in both *Hays* and this case held that the districts created by the State would not have satisfied the compactness criterion of *Thornburg* v. *Gingles, supra.* In *Hays,* the district court viewed that holding as negating the State's claim that it had a compelling interest in creating the additional majority-minority district in order to comply with Section 2. See 94-558 J.S. App. 8a n.4. In this case, the district court viewed its corresponding holding as negating the State's claim that the creation of the additional majority minority district was narrowly tailored. See App., *infra,* 80a. The difference between the holdings does not appear to be a significant one.

diction and entertain full briefing and argument in both cases. The questions presented in both cases, however, are important ones and warrant expeditious resolution by this Court. If districting plans are ultimately overturned in either State, it is important that the state legislatures have adequate time to formulate new plans in time for the 1996 electoral cycle. We have already filed a jurisdictional statement asking that this Court grant plenary consideration to the appeal in *Hays*, and it appears that *Hays* will be ripe for the Court's consideration before this case. Therefore, unless the Court believes that the issues are framed more squarely or otherwise presented in a clearer light in this case, it would be appropriate for the Court to note probable jurisdiction and resolve *Hays* after full briefing and argument on the merits, and to hold this case pending the Court's disposition of *Hays*.

In our view, the key questions in both cases concern the relevance of legislative intent, the determination of when a district may be said to be so bizarre on its face that strict scrutiny is required, and the application of the strict scrutiny standard. Those questions are squarely presented in both cases. Although the district courts in each case adopted somewhat different rationales, those rationales—along with the rationales of the other courts that have addressed the application of *Shaw*—can be tested equally well against the facts of either case.

CONCLUSION

The Court should hold this appeal pending its decision in *United States* v. *Hays*, No. 94-558, and should subsequently dispose of this appeal as appropriate in light of its decision in that case.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 194-008

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE DELOACH; and GEORGE SEATON, PLAINTIFFS

v.

ZELL MILLER, ET AL., DEFENDANTS

and

LUCIOUS ABRAMS, JR., ET AL.,
INTERVENOR-DEFENDANTS

and

UNITED STATES OF AMERICA,
INTERVENOR-DEFENDANTS

MEMORANDUM OPINION
AND ORDER

Before Edmondson, Circuit Judge; Edenfield, Chief District Judge; Bowen, District Judge.

PER CURIAM:

Plaintiffs challenge the constitutionality of Georgia's Eleventh Congressional District and seek an injunction against its further use in congressional elec-

tions. Because we find that the district violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, we grant Plaintiffs' request for injunctive relief and will impose a revised plan in keeping with this Memorandum and Order.

INTRODUCTION

In 1993, the Supreme Court recognized a citizen's right under the Equal Protection Clause to challenge a strangely shaped voting district as an impermissible racial gerrymander. *See Shaw v. Reno*, 113 S.Ct. 2826 (1993). The way was thus cleared for constitutional claims against congressional voting districts in North Carolina, Louisiana, Texas, Florida, and now Georgia.

Southern states have proved fertile grounds for *Shaw* claims, as many of their legislatures labor under the long shadow of the Voting Rights Act of 1965: By that law, certain states or political subdivisions are prohibited from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless they (1) obtain a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) have submitted the proposed change to the Attorney General and the Attorney General has precleared it. 42 U.S.C. § 1973b-c (1993). This procedure applies to redistricting plans, 28 C.F.R. § 51.13 (1993), and it is intended to police those regions of the United States that had, as of certain dates, maintained voting "tests or devices" serving to disenfranchise minority voters.

42 U.S.C. § 1973b. Many Southern states were so designated. *See* 28 C.F.R. § 51 (at Appendix) (listing, among other areas, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, and sections of North Carolina and Florida).

Consequently, many southern states seek preclearance from the Department of Justice (hereinafter sometimes referred to as "DOJ") before enacting their proposed redistricting plans. Department regulations require DOJ to decide "[w]hether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group"; if the change may be so described, DOJ will not preclear it. 28 C.F.R. § 51.52. In making its determination, DOJ is required to consider the following "important background information":

> (1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.
>
> (2) The extent to which minorities have been denied an equal opportunity to influence elections and the decisionmaking of elected officials in the jurisdiction.
>
> (3) The extent to which voting in the jurisdiction is racially polarized and politcal activities are racially segregated.
>
> (4) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

Id. § 51.58. It must also consider the following factors specific to the redistricting process:

(a) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens.

(b) The extent to which minority voting strength is reduced by the proposed redistricting.

(c) The extent to which minority concentrations are fragmented among different districts.

(d) The extent to which minorities are overconcentrated in one or more districts.

(e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.

(f) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.

(g) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

Id. § 51.59.

This litany makes it fairly clear that, by instruction of the United States Congress, racial concerns are DOJ's overriding criterion for approving a redistricting plan.

Shaw v. Reno holds that if a plaintiff shows that racial concerns were the overriding criterion for drafting a redistricting plan, leading to the creation of dramatically irregular district boundaries, that plan is unconstittuional, unless it survives constitutionally strict scrutiny. *See Shaw*, 113 S.Ct. at 2826-27.

And therein lies the problem.

I. FACTS

Pursuant to the results of the 1980 Decennial Census, the State of Georgia was entitled to ten seats in the United States House of Representatives. Due to population increases revealed by the 1990 Census, that number increased to eleven. This change required the reformatting of Georgia's congressional districts, a task begun by House and Senate reapportionment [1] committees during the 1991 session of the Georgia General Assembly. The task would prove far more onerous than anticipated.

In order to clarify the drafting process, on February 28, 1991 both the House and Senate adopted redistricting guidelines. *See* Joint Exh. 9, 10. Both versions required public hearings, allowed for submissions by "third parties" outside the Assembly, and provided a list of drafting criteria: single-member districts only, equality of population among districts, contiguous geography, avoiding dilution of minority voting strength, following precinct lines where possible, and compliance with sections 2 and 5 of the Voting Rights Act (hereinafter sometimes referred to as "VRA") 42 U.S.C. § 1973, et seq. Once these requirements were met, drafters could consider maintaining the integrity of political subdvisions, preserving the core of existing districts, and avoiding contests between incumbents.

While the House and Senate surely considered these criteria a realistic tool for drafting reasonable voting

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[1] Technically, "reapportionment" refers to the allocation of representatives among previously established voting areas, while "redistricting" refers to the reformulation of boundaries for those voting areas. We use the words interchangeably, however, since the legislature, case law, and parties' attorneys do so.

districts, and while many of their members were veterans of past redistricting wars, the legislators could not have known what the DOJ would require by way of compliance with sections 2 and 5 of the VRA.

A. *The Preclearance Process*

1. The Max-Black Plan

One of the "third party" redistricting proposals submitted to the legislature in 1991 would later earn the ominous moniker, "the max-black plan." That plan, created by Ms. Kathleen Wilde, then an attorney with the American Civil Liberties Union ("ACLU") and in her capacity as advocate for the Black Caucus of the Georgia General Assembly, provided for three "majority-minority" congressional districts[2] in Georgia: the Second, Fifth and Eleventh. Tr. IV, at 70-72, 93; Joint Exh. 4 (version of max-black plan proposed by Reps. Cynthia McKinney and Tyrone Brooks). In contrast, the then existing congressional plan had only one majority-minority district: the Fifth. Joint Exh. 15.

Ms. Wilde's drive to create three majority-minority districts came, predictably enough, from her clients, including Rep. Tyrone Brooks. Brooks made several illuminating statements during the redistricting debate on the floor of the Georgia House:

> This plan [the first redistricting proposal to be submitted to DOJ by the General Assembly] does not come close to the criteria outlined by the Attorney General last summer, when he specifi-

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[2] That is, a district in which a majority of the population is black.

> cally told the states covered by the Act that wherever possible, you must draw majority black districts, wherever possible.
>
> . . . Obviously, it's possible to draw three; those of us who have been working on the max plan for over a year have really not been concerned about anything other than maximizing our voting strength.
>
> We've not been really concerned about territory; we've not been concerned about voter registration numbers, we've been concerned about population, and black voting age population. When you start playing games with lines and numbers on voter registration and—all of these other things that really don't matter, you are just simply wasting time.

Pltf. Exh. 132, at 40. Ms. Wilde claimed that her purpose "was to draw as many districts as possible consistent with equal opportunity for black citizens in Georgia." Tr. IV, at 71. That is, her plan attempted to secure proportional representation for the black population. *Id.* at 72. However, despite Ms. Wilde's vague answers to this query at trial, *id.* at 73-74, it is clear that the max-black plan accounted for virtually all major concentrations of black population in Georgia. *Compare* DOJ Exh. 1-3 *with* Joint Exh. 4. Ms. Linda Meggers, Director of Reapportionment Services for the Georgia General Assembly and probably the single most knowledgeable person available on the subject of Georgian redistricting, testified that, without including the heavy black populations present in metropolitan areas, achieving the percentages needed for a majority-minority district was impossible. Tr. I, at 97-98. Ms. Wilde accounted

for all such metropolitan populations, including Atlanta, Augusta, Macon and Savannah. Her proffered restraint in not seeking "over-proportional" black representation was disingenuous; a *fourth* majority-minority district, of equal population to the other ten congressional districts, was probably impossible to create.

The max-black plan further maximized black voting strength by pushing the percentage of black voters within its majority-black districts "as high as possible." Tr. IV, at 72-73 (testimony of Ms. Wilde). Indeed, race was "certainly an overriding factor," *id.* at 81, 97, in designing Ms. Wilde's district boundaries, as she believed was required by the Voting Rights Act and *Thornburg v. Gingles*, 478 U.S. 20 (1986). Significantly, she also thought that the proper measure of "compactness," a venerable districting consideration directly relevant to the resulting shape of voting districts, was a "functional" measure, not one grounded in geographical assessments. Tr. IV, at 79. That is, while geography was a "component" of compactness, the more important element was whether people were "able to know what district they're in, know who their representative is and be able to have that person represent them." *Id.* Ms. Wilde agreed "[t]o some degree" with Rep. Brooks, who told the Georgia House:

> So those of us who are promoting the max plan are drawing the lines sometimes in funny ways to cut us in, because we've never really been fully in.
>
> So simply as I say to you today to adopt the max-black congressional plan, I say to you it's

> not really the appearance of the district; it's the content of the district.

Id. at 95; Pltf. Exh. 132, at 43.

Ms. Wilde testified that she submitted her max-black plan to DOJ several times during the redistricting process. We now turn to the connection between that plan and the one ultimately approved by the Department of Justice.

2. ACLU Advocacy and DOJ Preclearance Requirements

The Court realizes that the motivations of the State of Georgia are the legally relevant motivations in this case, and not those of the ACLU or the DOJ. We consider the behavior of the latter parties, however, because it is inextricably linked to the redistricting decisions of the General Assembly. The actions of the legislature have much less significance when removed from their context.

a. ACLU-DOJ Cooperation

During the redistricting process, Ms. Wilde was in constant contact with both Keith Borders and Thomas Armstrong, the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. *See* Tr. IV, at 39, 231. There were countless communications, including notes, maps, and charts, by phone, mail and facsimile, between Wilde and the DOJ team; those transactions signified close cooperation between Wilde and DOJ during the preclearance process. The Court was presented with a sampling of these communiques, and we find them disturbing.

It is obvious from a review of the materials that Ms. Wilde's relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities. *See, e.g.*, Pltf. Exh. 57H, 57I. DOJ was more accessible—and amenable—to the opinions of the ACLU than to those of the Attorney General of the State of Georgia. *See* Pltf. Exh. 52, 54, 57, 57A-M, 165; Tr. V, at 3-4. It is clear from our proceedings that Ms. Wilde discussed with DOJ lawyers the smallest details of her plan, constantly sending revisions, updates, and data throughout the period from October, 1991 to April, 1992; she occasionally sent documents to DOJ lawyers "per your request." Ms. Wilde worked with DOJ in other ways: During the reapportionment process for Georgia's House districts, DOJ attorney Nancy Sardison told Mark Cohen, the Senior Assistant Attorney General for Georgia, to meet with Ms. Wilde to revise a majority-black House district. Mr. Cohen had presumptuously thought the district satisfactory, but was dutifully informed by Ms. Sardison that Ms. Wilde was "still having some problems with it." Tr. V, at 3.

Contrary to Mr. Armstrong's claims at trial, the max-black proposal was not merely "one of the alternatives [DOJ] considered," and Ms. Wilde was not simply one of various advocates. Her work was of particular importance to DOJ lawyers, whose criteria for and opinions of Georgia's submissions were greatly influenced by Ms. Wilde and her agenda.

Alas, it is true that none of the DOJ attorneys testifying at trial admitted to the influence of Ms. Wilde and her max-black plan on their preclearance deliberations. This Court finds it distressing that

Messrs. Borders and Armstrong lacked any significant memory of important elements of the 1991-92 preclearance saga. Both of them—especially Mr. Borders—intimately involved with the redistricting for months, just "don't recall" basic details of either important meetings or the preclearance process. *See, e.g.*, Tr. IV, at 8-51; 145-150. Those in far more peripheral roles had no great difficulty remembering the events central to our inquiry.[3] Frankly, based on the factual record and trial testimony, the Court finds Borders' and Armstrong's professed amnesia less than credible. Luckily, the surrounding evidence speaks quite clearly.

Beyond the working relationship noted above, evidence of the link between Ms. Wilde and DOJ's preclearance requirements is provided by simply comparing the max-black plan with DOJ's demands of the General Assembly. While DOJ's policy of minority vote maximization had been in force before the 1991-92 preclearance process,[4] the effect of Ms.

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[3] The Court finds it particularly difficult to believe that Borders simply "doesn't remember" why the Voting Section would have told the General Assembly to extend the Eleventh District all the way down to Chatham County.

[4] Tr. III, at 24-26 (testimony of Assistant Attorney General for Civil Rights John Dunne). Mr. Armstrong himself testified that:

> what we did and what I did specifically was to take a Clorapleth [sic] map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength.

Tr. IV, at 135. This is, essentially, a search for maximization by the crudest means.

Wilde's efforts on Georgia's redistricting fortunes is evident on the face of the precleared plan. Before comparing that plan to the max-black proposal, we first review the stages of Georgia's quest for DOJ approval.

b. Round One

After a special session beginning in late August, 1991, the General Assembly submitted a congressional redistricting plan for preclearance on October 1 of that year. The plan, Joint Exhibit 3, contained two majority-minority districts, the Fifth and Eleventh, and a third district, the Second, where blacks comprised an influential but submajority percentage of the voting age public.[5] *See* Pltf. Exh. 1, at 8-10.

This plan, like most redistricting efforts, was the culmination of committee meetings, public hearings, examination of various districting proposals, and many hours spent with an extremely sophisticated computer.[6] Rep. Robert Hanner, Chairman of the

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[5] The relevant data for districts 2, 5, and 11 of the first submitted plan are as follows:

District	Black Pop % of Total	Black VAP % of Total
2	39.47	35.37
5	62.13	57.84
11	60.63	56.61

[6] Ms. Meggers provided the Court with an enlightening demonstration of state-of-the-art redistricting on her computer, "Herschel." Only Georgians truly understand the depth of respect that is accorded to this equipment by such an appellation. When fed geographic and demographic data (including black voting age population data), it allows the user to map voting districts at the census bloc level with the greatest of ease.

Georgia House reapportionment committee, and Senator Eugene Walker, Chairman of the Georgia Senate reapportionment committee, worked closely with Linda Meggers to hammer out Georgia's first submission. Neither Ms. Meggers, a central figure in construction of all Georgia districting plans submitted to DOJ, nor Senator Wayne Garner, the Majority Leader of the State Senate during the reapportionment process, found any evidence of acts or statements by Rep. Hanner, Senator Walker, or other legislators indicating an intent to discriminate against minority voters. The Court finds no evidence prompting us to doubt that conclusion.[7]

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[7] The Court has reviewed correspondence from Rep. Cynthia McKinney to John Dunne accusing the Georgia House reapportionment committee of ignoring the Brooks-McKinney max-black House redistricting proposal and only reluctantly allotting computer time to Rep. McKinney's redistricting efforts. Pltf. Exh. 51. Comment letters from the ACLU echo these accusations. Pltf. Exh. 52. Neither the State Defendants nor the Intervenors, however, have presented any further evidence or testimony corroborating Rep. McKinney's claims. Rep. Brooks made no mention of them during his testimony. We also note that he had no difficulty touting the max-black proposal on the floor of the House from the very beginning of the process. *See, e.g.*, Pltf. Exh. 130, 132. The Georgia Senate was equally amenable to Senator Sanford Bishop's advocacy for three majority-black districts. Pltf. Exh. 131. *See also* Pltf. Exh. 140 (comments of then-Senator Bishop, now a member of the United States House of Representatives, at Georgia House Congressional Committee meeting).

The statements of the Speaker of the House, the Chairpersons of the House and Senate committees, and Linda Meggers all reveal a legislature driven to satisfy the demands of DOJ, and contain no indication of efforts to suppress the black vote. Thomas Armstrong could not recall seeing any evidence of discriminatory motives on the part of the Georgia legislature. Tr. IV, at 145-50.

The first submitted plan did not garner universal support within the General Assembly; a version of the max-black plan had been proposed in the Georgia House, but could not attract enough votes for stretching the new Eleventh District to Savannah. Tr. III, at 248-50; Pltf. Exh. 6A-B. More importantly, the plan garnered no support from DOJ, which rejected it by letter dated January 21, 1992. Pltf. Exh. 2.

In that letter, John Dunne, then Assistant Attorney General for Civil Rights, noted a "concern" that the Georgia legislative leadership had decided to "limit" black voting potential to two majority-minority districts. Throughout the preclearance process, from this first objection letter to the final submission, DOJ relied on versions of the max-black plan to argue that three majority-minority districts could indeed be squeezed out of the Georgia countryside. Tr. IV, at 115 (testimony of T. Armstrong). Ms. Wilde's triumph of demographic manipulation became DOJ's guiding light. Though DOJ denied that the max-black plan was the "benchmark" against which Georgia's efforts were compared, its role as such soon became obvious to the General Assembly, and is now obvious to this Court.

Mr. Dunne also observed that, while the submitted plan properly utilized black voting potential in Atlanta and east-central Georgia, it did not "recognize" concentrations of minorities in the south-west region of the state. He then assured Mark Cohen that "[s]ection 5 considerations certainly do not dictate that the state adopt any particular configuration," but went on to "note" the "exclusion" from the Eleventh District of black populations in adjacent Baldwin County. Pltf. Exh. 2.

Mr. Dunne ultimately found himself unable to conclude that the Eleventh District, 60.63% black, with a black voting age population of 56.61%, and using nearly unpopulated land bridges to rope in black concentrations in Dekalb and Richmond Counties, satisfied the requirements of the Voting Rights Act. Apparently finding that this district—and the plan generally—"ha[d] the purpose or will have the effect of denying or abridging the right to vote on account of race," Mr. Dunne refused to preclear the submitted plan. *Id.*

c. Round Two

No one in the General Assembly doubted that any revised submission must include the changes "suggested" by DOJ. Though counsel for the United States objected to Plaintiffs' "characterization that the Justice Department 'suggested' things," Tr. IV, at 120, it is disingenuous to submit that DOJ's objections were anything less than implicit commands. No one in the General Assembly—including the Black Caucus—thought so, and DOJ lawyers did nothing to dissuade legislators of that notion.[8]

A few prescient souls were already convinced that any successful Georgia submission would have to "have the highest percentage of black population that we could get, irregardless [sic] of where we have to

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[8] In order to further improve the chances of preclearance, Georgia legislators and staff met with DOJ officials in Washington on at least one occasion. At one such meeting, after the first DOJ rejection and while the second submission was pending, the legislators were informed that their economic and political rationales for the proposed districts were "pretextual," and told to subordinate their economic and political concerns to the quest for racial percentages.

go." Tr. III, at 210. Senator Garner was convinced that, though "distasteful," "to get a plan passed [*sic*] the Justice Department and get us out of here and on to these elections, that district is going to have to go to Savannah." *Id.* Having convinced the State Senate of this political reality, that body passed a plan extending the Eleventh District to Chatham County. *Id.* at 211-12; DOJ Exh. 76. The House, however, refusing to tack Savannah to the Eleventh until DOJ forced them to do it, did not pass the Senate bill. Tr. III, at 213, 250. The final version, submitted on March 3, 1992, did not contain the Savannah extension. DOJ Exh. 76.

It did, however, contain a Second District in which black voting strength had been increased to 45.01%, and a Fifth and Eleventh District where blacks comprised close to 60% of the voting age population.[9] Pltf. Exh. 3A. In the Eleventh, faithful to DOJ's first objection letter, the General Assembly split Baldwin County to "recognize" the black populations that had previously been "excluded" from that district. Many black representatives voted for the plan, more in the Senate than in the House. Pltf. Exh. 6A-B.

Predictably, DOJ rejected the plan, since, after all, someone—here the Senate relying on versions of the max-black proposal—had come up with a scheme for

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[9] The relevant data for districts 2, 5, and 11 of the second submitted plan follows:

District	Black Pop % of Total	Black VAP % of Total
2	49.15	45.01
5	62.27	57.47
11	61.86	57.97

packing even more minority voting strength into the Second, Fifth and Eleventh Districts. And so, despite the fact that the second submission addressed the criticisms levelled at the first, DOJ sent the plan back to the General Assembly yet again, and this time with new demands.

Since it was geographically possible to extend the Eleventh District to Savannah, Mr. Dunne, by letter dated March 20, 1992, made it a requirement for preclearance:

> [T]he submitted plan minimizes the electoral potential of large concentrations of black population in several areas of the state. Specifically, we note that alternatives, including one adopted by the Senate, included a large number of black voters from Screven, Effingham and Chatham Counties in the 11th Congressional District. However, due to unyielding efforts on behalf of House members, this configuration was abandoned and no legitimate reason has been suggested to explain the exclusion of the second largest concentration of blacks in the state from a majority black Congressional District.

Pltf. Exh. 4, at 3. The first rejection letter never mentioned this extension to Screven, Effingham and Chatham Counties.[10]

Mr. Dunne then noted that "[a]lthough the submitted plan has increased the black percentage in the 2d Congressional District, it continues the exclu-

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[10] DOJ attorneys had suggested an extension to Chatham County during a meeting in Washington after receipt of the first objection letter and submission of Georgia's second plan. Tr. V, at 10-14 (testimony of Mark Cohen). *See also* Tr. IV, at 192 (testimony of Lt. Gov. Pierre Howard).

sion of large black population concentrations in areas such as Meriwether, Houston, and Bibb Counties from this district." *Id.* Of course, DOJ was aware that the only way to transfer the dense black population of Bibb County from the Eleventh District to the Second District and still maintain the Eleventh as a majority-minority district was to extend the Eleventh to Savannah, where dense black populations in that city would make up for the loss of black voters in Bibb County. Georgia Attorney General Michael Bowers made the observation himself in the second plan submitted to DOJ. Attorney General Bowers also explained why the state had declined to follow that course:

> The reason the General Assembly chose not to adopt a configuration for the 2nd District which would have altered the 11th District in this fashion is two-fold. First, if the 11th District extends from the Atlanta area in DeKalb County into the metropolitan areas of Richmond, Bibb, *and* Chatham Counties, a candidate to be successful will have to run in four major media markets in Georgia. This would likely present a significant problem for any minority candidate in the 11th District, as recognized even by the proponents of the "Brooks-McKinney" [max-black] plan. . . .
>
> Second, it is clear that even if the population percentage is increased several more points in the 2nd District . . . the 2nd District will still be no more than an influence district for minority voters. Black voter registration in this area has been historically low. . . . In addition, the extension of the 2nd District into Bibb County

> and the corresponding extension of the 11th District into Chatham County, with all of the necessary attendant changes, violate all reasonable standards of compactness and contiguity.

Pltf. Exh. 3A, at 8.

The Macon/Savannah "trade" was the linchpin of Ms. Wilde's max-black plan and all the versions of it submitted to the Assembly; Ms. Wilde had been marketing it since at least October 15, 1991, describing the switch to DOJ as the "key to drawing a third black district." Pltf. Exh. 57 (facsimile from Ms. Wilde to Sheila Delaney, DOJ Voting Section). It was the centerpiece of her advocacy for the General Assembly Black Caucus:

> MR. PARKS: The advocacy that you met [sic] with the Department of Justice was to move Bibb County—the black population of Bibb County to the Second?
>
> MS. WILDE: That's right.
>
> MR. PARKS: And replace them by dropping the Eleventh all the way down to Savannah?
>
> MS. WILDE: That's correct.
>
> MR. PARKS: And excise out of Savannah black population?
>
> MS. WILDE: I took majority black precincts in Savannah and put them in my district, which is how you draw a majority black district.
>
> MR. PARKS: And intentionally excluded white population?
>
> MS. WILDE: Again, I did that because that is how you draw a majority black district.

Tr. IV, at 83. *See also id.* at 82.

It is from Ms. Wilde's plan and its progeny that DOJ lifted the concept for its own objection letters. It "was the evidence relied upon for the three minority district proposition." Tr. IV, at 115 (testimony of T. Armstrong). Armstrong refused to admit that Mr. Dunne's second objection letter was beholden to the max-black plan, observing that Ms. Wilde's plan was but one of many alternatives presented to DOJ. *Id.* at 116. The Court notes, however, that the necessary kernel of a viable three-district plan—the Macon/Savannah trade—originated with Ms. Wilde. Her plan was permised upon it, and was the foundation of the first three-district plan proposed in the General Assembly. Other plans presenting three majority-black districts were in turn based on that one. Any such proposal reviewed by DOJ switched Macon from the Eleventh to the Second District and drew Savannah into the Eleventh, and it owed that crucial element to Ms. Wilde's original version.

d. Round Three

It was now clear to the General Assembly that preclearance would not be forthcoming without adopting this *raison d'etre* of the max-black proposals.[11]

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[11] We note that the State of Georgia did not choose to seek a declaratory judgment from the D.C. District Court when it became obvious that DOJ would accept nothing less than abject surrender to its maximization agenda. Mark Cohen testified that since the circumstances of the 1991-92 redistricting were similar to those of 1981-82, such an effort would have been unsuccessful. In the 1981-82 process, Georgia sought a declaratory judgment that the state had gone far enough in strengthening black voting power, and was not required to ratchet up the black voting age population of the 5th Congressional District to 65%. As here, the Georgia Senate had passed a plan acquiescing to DOJ's demands, and

This goal dominated the creation of the third Georgia submission. Linda Meggers admitted that, when drafting the proposal, the max-black plan was her "benchmark," Tr. I, at 65, and that she "fine tuned" the plan to "get to those numbers." *Id.* at 102.

The result of these efforts was a congressional districting plan with three majority-minority districts: the Second, with 52.33% black voting age population, the Fifth, with 57.47%, and the Eleventh, with 60.36%.[12] The plan passed by one vote—Speaker Thomas Murphy "held [his] nose and shut [his] eyes and put one elbow in one ear and voted for it and passed it to get something to keep the courts from doing it." Dep. of Spkr. Murphy, at 31. Ms. Meggers came as close as she could to copying the max-black percentages. She was prevented from exact duplication by the need to construct eight other

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the House had refused to endorse it. The D.C. court held that Georgia had failed to satisfy the requirements of section 5. *See Busbee v. Smith,* 549 F. Supp. 494 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983).

Mr. Cohen's conclusion was buttressed by Sandra Coleman, Deputy Chief of the DOJ Voting Section, who noted these similarities during the second meeting between Georgia and DOJ officials in Washington, D.C. Add to this the cost of litigating in D.C. and the time pressures on the Assembly, and it becomes clear that a declaratory judgment action was not likely.

[12] The relevant data for districts 2, 5, and 11 of the third proposed plan follows:

District	Black Pop % of Total	Black VAP % of Total
2	56.63	52.33
5	62.27	57.47
11	64.07	60.36

districts around the majority-minority districts, and her efforts to "clean up" the max-black plan to minimize the number of split counties. *Compare* Joint Exh. 1 *with* Joint Exh. 4. Ms. Wilde herself thought that Georgia's third plan was a fairly successful recreation of her proposal:

> MR. PARKS: [T]he result was the creation of three minority districts that achieved the percentage benchmarks that the Max Black plan advocated?
>
> MS. WILDE: Yes, that's what the State of Georgia decided to draw.

Tr. IV, at 100. Rep. Brooks agreed. *See* Tr. IV, at 229.

The latest redistricting plan bore all the signs of DOJ's involvement: The black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties, 23 more than the existing congressional districts. Joint Exh. 1. The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges.[13] Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way.

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[13] We further explore the characteristics of the Eleventh District in our discussion of strict scrutiny, *infra*.

DOJ precleared the plan, which was hand delivered to DOJ by Mark Cohen. During his visit, Keith Borders opined that even this plan did not go far enough, voicing objections that Ms. Wilde and Rep. Brooks were even then faxing to the Voting Section. On April 2, 1992, however, Mr. Cohen was finally able to leave Washington with a letter of preclearance from Mr. Dunne. Pltf. Exh. 6.

B. *The Ramifications of DOJ Involvement*

1. DOJ Methods

a. The Use of Informants

During our hearings it became clear that the Department of Justice had cultivated a number of partisan "informants" within the ranks of the Georgia legislature, including at least one State Senator—a congressional candidate no less—and an aide to Lieutenant Governor Howard. *See* Response Of United States To Plaintiffs' Statement Concerning Confidential Informants, July 7, 1994. DOJ regularly received from them information on the General Assembly's redistricting sessions. DOJ apparently read federal regulations as condoning this behavior, but misconstrued the spirit of those provisions. *See* 28 C.F.R. 51.29. Thy were intended to facilitate outside notification to DOJ of impending changes in voting procedure in jurisdictions covered by section 5, since DOJ could not closely monitor all such areas on a continual basis. The regulations require DOJ to respect requests for anonymity, in order to encourage individuals to report. The events in this case do not reflect the regulations' intended purpose. Politicians and other parties in interest found a discrete forum.

Here, "whistleblowers" became "secret agents." They reported to DOJ throughout the section 5 review process. DOJ used that information even to question the integrity of State legislators who could not know their accusers.

Keith Borders testified that "allegations are brought to our attention and then we go back and ask individuals about those allegations." Tr. IV, at 9. One of DOJ's informants informed Mr. Borders that State Senator Eugene Walker was a "quintessential Uncle Tom," and "the worst friend of blacks in Georgia." Tr. IV, at 27. During the first meeting between a Georgia delegation and Voting Section lawyers, there was a confrontation involving Borders and Walker, although Borders "doesn't recall" whether he challenged Senator Walker with those unattributable comments. However, either these anonymous "allegations" or some other suggestion so offended Senator Walker that he refused to attend further meetings with DOJ staff.

DOJ's agents provided an irrebuttable source of intelligence of which the General Assembly was completely unaware. We find this practice disturbing.

b. The Use of Alternative Plans

Thomas Armstrong testified that DOJ used alternative plans submitted by special interests as means with which to question the configuration of Georgia's submitted plans, i.e., if an alternative proposal had found some clever means of further boosting African-American voting strength in Georgia, why hadn't the Assembly adopted it? *See, e.g.*, Tr. IV, at 140-41. For DOJ, if these alternative plans had discovered heretofore untapped wells of racial voting power absent from the submitted plan, the inescapable conclu-

sion was that the State's proffered reasons for the submitted configurations were "pretextual" ones.

There is a problem with this position: It apparently did not occur to DOJ that increased "recognition" of minority voting strength, while perhaps admirable, is properly tempered with other districting considerations. The ACLU and Reps. Brooks and McKinney were concerned only with racial percentages. They could afford such a narrow focus. The General Assembly leadership was concerned with passing redistricting legislation affecting all Georgians, and contended with numerous factors racial, political, economic, and personal. As the lawmaking body for the entire state, the General Assembly could *not* afford such a narrow focus. Consequently, its submissions reflected many influences, and the ACLU's reflected only race. *Of course* DOJ could then compare Georgia's plans to the max-black plan and find the latter a more effective means of magnifying the minority vote. The max-black plan reflected nothing but its drafters' concerns: race and technical contiguity. DOJ's mistake was in assuming that Georgia's plan must be so conceived. As one legislator quipped:

> [I]t's very difficult, it seems, to get them to realize that maybe there's a little bit more to reapportionment than black and white or minority areas; that there should be some alignment between the areas so they can work together for the next ten years.

Pltf. Exh. 143. Difficult indeed.

2. ACLU Involvement

It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear: the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU and the preclearance requirements imposed by DOJ.

Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. A poignant example: in a notable *faux pas*, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press. DOJ had notified the ACLU of its impending objection; the ACLU then notified the Black Caucus. This unfortunate spate of gossip created the impression that the ACLU and the Black Caucus wielded significant influence with DOJ's Civil Rights Division and significant control over Georgia's redistricting efforts. The State's leaders were understandably nonplussed. The ACLU was exuberant. Georgia officials and citizens were mystified.

We are simply troubled by the result. It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote. That right is vital to citizens of a democracy, and

of poignant importance to African-Americans. For many blacks Jim Crow is living memory,[14] and the presence of black luminaries and ordinary citizens at our hearings is a testament to their concern. This Court does not underestimate the emotional investment in our decision of blacks still resisting the vestiges of racial discrimination,[15] and we have been placed in the unenviable position of depriving black citizens of a privilege the Justice Department never had the right to grant: maximization of the black vote, whatever the cost.

* * *

Elections were held under the new congressional redistricting plan on November 4, 1992. Black candidates were elected to the United States Congress from all three majority-minority districts. Cynthia McKinney, running in the Eleventh, became Georgia's first black congresswoman. On January 13, 1994, Plaintiffs filed this action.

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[14] See *South Carolina v. Katzenbach*, 383 U.S. 301, 310-15 (1965) for a review of modern state government efforts to deny blacks the ability to vote.

[15] We acknowledge in this regard the amicus contribution of Judge A. Leon Higginbotham, Jr., Special Counsel to the Congressional Black Caucus. Various of Judge Higginbotham's comments echoed those of ex-Labor Commissioner Albert Scott, who testified to the remains of racial bigotry in rural Georgia. *Compare* Amicus Brief at 16 (asserting that Georgia Supreme Court Justice Robert Bentam won elections in 1984 and 1990 "with a strategy of obscuring the fact that he is black") *with* Tr. VI, at 79 (testifying that some white political candidates use the tactic of specifically advertising to rural voters that their opponents are black).

II. LAW

A. *Shaw v. Reno*

Though initially daunting, the Supreme Court's opinion in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), is a bit less than a riddle wrapped in an enigma. We begin with some general observations, and then continue with an analysis of the Eleventh District.

The majority opinion in *Shaw* is premised on the uncontroversial proposition that race-based redistricting should be treated like any other race-based legislation. From there, the argument is straightforward: (1) racial classifications, per the Fourteenth Amendment, are "presumptively invalid, and can be upheld only upon an extraordinary justification." *Brown v. Board of Education*, 347 U.S. 483 (1954); (2) in light of the Voting Rights Act, race is obviously a valid consideration in redistricting, but a voting district that is *so* beholden to racial concerns that it is inexplicable on other grounds becomes, ipso facto, a "racial classification;" (3) if a district may be so described, it must have an "extraordinary justification," that is, it must survive constitutionally strict scrutiny, in order to be upheld.

The above analysis begs the question: How to determine if a district is so founded upon race that it warrants constitutional notice? By examining the shape of the district itself: if its contours are so contorted as to permit no other conclusion than that it was drawn along racial lines, the Supreme Court says those lines are clear—if circumstantial—evidence that the legislature "purposefully distinguish[ed] between voters on the basis of race." *Shaw*, 113 S.Ct. at 2826. This analysis is made a bit easier by the existence of defined and recognized

"traditional districting principles" that influence nearly all redistricting efforts. The nonexclusive list includes contiguity, compactness, protecting the integrity of political subdivisions, cognizance of "communities of interest," negotiating geographic barriers, and protecting incumbents. If the shape of the district advertises "disregard" for these considerations in favor of race-based line drawing, the district is a racial classification and subject to strict scrutiny.[16]

There is an important, if subtle, distinction to make here. Under *Shaw*, the shape of the district is "objective" evidence of the legislature's intent in drafting that district. *Id.* Discovering discriminatory intent is necessary to a successful Equal Protection claim. *Washington v. Davis*, 426 U.S. 229 (1976); *Mobile v. Bolden*, 446 U.S. 55 (1980) (extending requirement of "discriminatory purpose" to voting rights cases). The shape of the district is *not* a "threshold" inquiry preceding an exploration of the motives of the legislature. That is, the court does not assess, on first principles, whether the district looks "bizarre," and then, if it does, proceed to an Equal Protection analysis. A determination that the

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[16] The Supreme Court takes a reverse tack in describing the significance of traditional districting principles to a *Shaw* claim:

> We emphasize that these criteria are important not because they are constitutionally required—they are not, cf. *Gaffney v. Cummings*, [412 U.S. 735, 752 n.18 (1973)]—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. at 2827 (citation omitted).

district looks dramatically irregular *is* the beginning of an Equal Protection analysis; the strange district is the "smoking gun," revealing the racial intent needed for an Equal Protection claim.

We take pains to clarify this point because some have misinterpreted Justice O'Connor's observation that "reapportionment is one area in which appearances do matter." *Shaw*, 113 S.Ct. at 2827. Yes, appearances do matter, but in two extremely particular ways: (1) as a proxy for direct evidence of the legislature's intentions, and (2) as a harm adequate to meet the constitutional criteria for standing to sue. The former idea is not a wholly new one. As the High Court notes, there are intellectual precursors to the *Shaw* opinion making it a logical extension of past practice. *See Shaw*, 113 S.Ct. at 2825-26 (reviewing cases). *See also Rogers v. Lodge*, 458 U.S. 613 (1982) (deferring to district court finding that sum of evidence supports inference that voting scheme was maintained for discriminatory purposes). The latter concept, however, is a bit of an innovation.

1. Standing to Bring a *Shaw* Claim

In both *Shaw* and the instant case, the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters. Under the Supreme Court's most recent pronouncements, this lack of concrete, individual harm would deny them standing to sue. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). *Shaw*, however, implicitly recognizes a different kind of harm, distinct from vote dilution and sufficient to state a "cognizable" Equal Protection claim: "Classifying citizens by race, as we have

said, threatens special harms that are not present in our vote dilution cases. It therefore warrants different analysis." *Shaw*, 113 S.Ct. at 2828. Those harms are systemic ones, rooted in social perception of state-sanctioned racial classifications:

> Justice Souter [in dissent] apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. . . . As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signalling to elected officials that they represent a particular racial group rather than their constituency as a whole. . . . Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

Id. It is this distinct kind of damage that enables the Court to distinguish *Shaw* from a group of white plaintiffs' failed vote dilution claim in *United Jewish Organizations, et al. v. Carey*, 430 U.S. 144 (1977) (hereinafter "*UJO*"); in that case, the districts were regularly shaped. *See id.* at 167-68 (opinion of White, J.). *Shaw* explicitly reserves any thoughts on whether the deliberate creation of a majority-minority district, "without more,"—meaning without a dramatically irregular shape—gives rise to an Equal Protection claim. *Shaw*, 113 S.Ct. at 2828.[17]

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[17] The court in *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 43 (E.D.N.C. Aug. 1, 1994), dealing with the Supreme Court's

Shaw v. Reno's expanded notion of harm liberalizes the standing requirement. The Eastern District of North Carolina, analogizing principally from *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 281 (1978), articulates the standing requirement for a *Shaw* claim as a showing that a redistricting plan has assigned a potential plaintiff to a district at least in part because of her race. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 27 (E.D.N.C. Aug. 1, 1994). The North Carolina court pursues an exhaustive discussion of *Shaw v. Reno*'s implications for the standing requirement, and we do not repeat it here. We feel that even that court's interpretation may not be as expansive as *Shaw v. Reno* intended, but are content to note that standing in this case is not in doubt: Plaintiffs occupy a position virtually identical to those

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remand, wonders about this reluctance, positing that perhaps the Supreme Court sought to avoid overturning its decision in *UJO* by stopping short of answering that question.

The distinction is more principled, however. The special harm that is the crux of *Shaw v. Reno*, the offense to "principles of racial equality" generated by blatantly manipulated voting districts, simply was not present in *UJO*, a case involving vote dilution, not district appearance. The issue of Equal Protection claims against normally shaped districts was beyond the scope of the *Shaw* opinion. For our part, we note that a compact majority-black voting district could not be challenged as a racial "gerrymander"; if the district is sufficiently compact, then presumably its drafters were able to accumulate enough black voters without carefully picking their way around white populations in search of black ones. Without that kind of manipulation, there is no "gerrymandering" to speak of—the state simply made a discrete voting district out of a discrete community. The *Shaw v. Reno* majority makes a similar point. *See id.* at 2826, 2828. *See also Wright v. Rockefeller*, 376 U.S. 52, 53-58 (1964).

challenging North Carolina's congressional redistricting plan in *Shaw v. Reno*, and in that case standing was not in doubt.

2. The Required Level of Racial Motivation in Redistricting

There has been some debate over the necessary prominence of race in legislative deliberations before it can be found that the redistricting plan is "unexplainable on grounds other than race," and thus subject to strict scrutiny. There are three possible solutions. Defendants in the instant case, along with some district courts, argue that race must have been the *sole* motivation behind a particular district shape before strict scrutiny is appropriate. Defendants cite language from *Shaw* in support: "[strict scrutiny is applied if the plan] is so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race[.]" *Shaw*, 113 S.Ct. at 2832. *See also Bridgeport Coalition v. City of Bridgeport*, 1994 WL 247075 (2d Cir.) (finding that a lower court order "did not transgress Shaw because it did not instruct the City Council to redistrict *solely* on racial grounds) (emphasis added); *Dewitt v. Wilson*, 1994 WL 325415 (E.D.Cal.) (stating, for example, "Shaw held when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under the Equal Protection Clause for racial gerrymandering can be stated.") (emphasis added).

A second school teaches that race need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect. *See Hays v. Louisiana*, 839 F. Supp. 1188,

1202, 1214 (W.D. La. 1993) (majority opinion and concurring opinion) (hereinafter "*Hays I*").

Shaw v. Hunt similarly holds that, in keeping with prior Equal Protection precedents, districts should be subject to strict scrutiny merely upon a showing that the state's use of race was deliberate.[18] *Shaw v. Hunt*, supra, at 35, 40. This test

> is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have placed a significant role in the precise location and shape of those districts.

Id. at 41. Specific intent is needed; the test is not met by demonstrating merely that the legislature was aware of a districting plan's racially discriminatory impact. In order to avoid condemning to "constitutional invalidity" all majority-minority voting districts drawn pursuant to Voting Rights Act requirements, the court states that while this test will subject practically all majority-black districts to strict scrutiny, the strict scrutiny standard should be applied "in a way that is sensitive not only to the state legislatures' statutory obligation [to give effect to minority voting potential under the VRA], but also to the special compromises that they must make in order to pass plans that draw such districts." *Id.* at 47.

There is an analytical problem with applying strict scrutiny while remaining "sensitive" to the plight of

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[18] It is not completely clear exactly what test *Shaw v. Hunt* espouses. The language of the opinion seems occasionally contradictory. *See* Majority Opinion, supra, at 41.

legislatures. Essentially, strict scrutiny tempered to accommodate legislative realities is not "strict scrutiny;" it is some lower standard designed to accommodate legislative realities. We feel that a better approach is to remove completely from constitutional suspicion those VRA-mandated redistricting plans that, as Plaintiffs say, "do it right." The proper interpretation of *Shaw v. Reno*'s "race-based" requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating* [19] *consideration* in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district. If race, however deliberately used, was one factor among *many of equal or greater significance* to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

We arrive on this middle ground after considering fundamental aspects of Equal Protection jurisprudence. After *Washington v. Davis*, intent is an indispenable element of successful discrimination claims under the Fourteenth Amendment. The plaintiff must show some discriminatory purpose impelling the legislature before strict scrutiny will be applied to the law in question. *See* 426 U.S. at 240. The Supreme Court has expounded on this intent requirement, hold-

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[19] We intend "motivating" in the sense that race was the most prominent element driving the legislatures' planning, not in the sense of one motivation among others of equal strength propelling the process.

ing that the Fourteenth Amendment is violated when race is a "substantial" or "motivating" factor in legislative decisionmaking. *See Arlington Heights v. Metropolitan Housing*, 429 U.S. 252, 265-66 (1977) (clarifying *Washington v. Davis*); *City Schl. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (adding word "substantial"). Decisions such as *Arlington Heights* are vital to properly reading *Shaw v. Reno*:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.

Arlington Heights, 429 U.S. at 265-66.

In the context of Equal Protection claims based on voting districts, the VRA is the kind of "broad mandate" intended by the Court under the *Arlington Heights* standard. Further, the phrase "unexplainable on grounds other than race," which the *Shaw v. Reno* majority frequently mentioned, is from the *Arlington Heights* opinion: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S. at 266. *See Shaw v. Reno*, 113 S.Ct. at 2825.

The intent requirement extends to voting cases, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982), and *Shaw* discusses certain voting precedents at length. *Shaw v. Reno*, 113 S.Ct. at 2825-27 (reviewing *Guinn v. United States*, 238 U.S. 347 (1915), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Wright v. Rockefeller*, 376 U.S. 52 (1964)). These cases clarify *Shaw*. For example, in *Wright*, minority plaintiffs brought suit under the Fourteenth and Fifteenth Amendments, claiming that several congressional districts in New York City were "irrationally" shaped and contrived to segregate voters on the basis of race. *Wright*, 376 U.S. at 53. A three-judge panel, presented with maps, statistics and other indirect evidence, dismissed the complaint, finding that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the district on racial lines." *Id.* at 56. The Supreme Court affirmed the dismissal, observing that while "[i]t may be true . . . that there was evidence which could have supported inferences that racial considerations might have moved the state legislature, . . . we agree [with the lower court] that there also was evidence to support [a] finding that the contrary inference was 'equally, or more, persuasive.'" *Id.* at 56-57. That is, the circumstantial evidence did not show that the New York congressional lines were influenced predominantly by race—other, equally plausible "inferences" could be drawn from the maps and charts.

So it is in *Shaw v. Reno*, but the standard is a bit tougher. In *Wright*, the congressional districts were upheld, but without the patina of legitimacy cast by the VRA, and despite "[defendant] New

York's frank concession that it is not possible to say 'that race is irrelevant to redistricting.'" *Id.* at 61 (Douglas, J., dissenting). *Shaw* concedes that latter point, 113 S.Ct. at 2826, thus elevating the finding needed for a successful Equal Protection challenge. When we read *Arlington Heights* and progeny in conjunction with *Wright*, we surmise the following: Where it cannot be shown that race was the "substantial" or "motivating" factor behind a voting district by demonstrating that racial concerns are the only ones plausibly to be inferred [20] from the district's lines, there is no valid Equal Protection claim.

In contrast to *Hays I* and *Shaw v. Hunt*, race can be a factor for the legislature, meaning one factor given no more prominence than various others, without triggering strict scrutiny. The legislature may intentionally consider race in redistricting—and even alter the occasional line in keeping with that consideration—without incurring constitutional review. It is the *abuse* of that privilege, exposed to the world via perverse district shapes "unexplainable on grounds other than race," that sparks further examination.[21] We think the race-saturated requirements of the Voting Rights Act require this result. Without such an allowance, and considering the present attitude of the Department of Justice, every state and local government in the United States subject to section 5 of the Voting Rights Act will be buried under *Shaw* litigation every time it passes a redis-

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[20] We consider the role of direct evidence in section II.B, supra.

[21] The analytical distinction here is similar to that made by Justice Powell in the affirmative action context. *See Regents v. Bakke*, 438 U.S. 265, 317-18 (1977).

tricting plan.[22] Since each plan must survive strict scrutiny—a factual inquiry—many lawsuits will result in full trials. We are reluctant to conclude that the Supreme Court intended voting rights litigation to sweep the country at ten-year intervals.

Race also need not be the *sole* motivation behind a redistricting plan before it is subject to further review. This is clear from a reading of *Arlington Heights.* 439 U.S. at 266. A *Shaw* claim is an Equal Protection claim; if the Supreme Court were drastically narrowing the Fourteenth Amendment intent requirement articulated in *Washington v. Davis* and subsequent decisions—specifically for a subset of voting rights cases—it would have said so. More importantly, the standard would be nearly impossible to meet: if race is admittedly one of many valid districting concerns, *Shaw,* 113 S.Ct. at 2826, then plaintiffs could never show that it was the "sole" concern behind a districting plan. A state legislature could always trot out some other traditional districting principle minimally served by the shape in question. *Cf. Hays I,* 839 F. Supp. at 1202.

The path most useful for negotiating the intricacies surrounding *Shaw v. Reno* and the Voting Rights Act is the middle one. Both the Supreme Court and Congress have already admitted that the Constitution is not genuinely "color-blind," but it does severely limit the race-based lengths to which a state

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[22] Cases such as the instant one show that this process has already begun. *See also Holder v. Hall,* 114 S.Ct. 2581, 2598 (1994) (arguing that the states' racial gerrymandering in response to judicial decisions and DOJ involvement "now promises to embroil the courts in a lengthy process of attempting to undo, or at least minimize, the damage wrought by the system we've created").

may go. The document does not suffer racial classifications gladly.

B. *Determining if Race was the Overriding Consideration in Creation of the Eleventh District*

1. Methods of Proof: Indirect and Direct Evidence

The Supreme Court's use of a district's shape as circumstantial evidence of legislative intent implies that proof might be made by other means. The *Shaw v. Hunt* court arrived at the same conclusion, finding that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the "intent" element of an Equal Protection claim under *Arlington Heights*[.]" *Shaw v. Hunt*, supra, at 40-41. The Western District of Louisiana concurs: "If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*." *Hays I*, 839 F. Supp. at 1195 (footnote omitted). *See also Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

This is clearly the correct approach. Defendants argued early in these proceedings that evidence of the legislature's intent to gerrymander must be inferred from the shape of the Eleventh District itself, and not from direct testimony of those involved with the process. This view finds little support in *Shaw*

v. Reno. The purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards: if the district appears uninfluenced by accepted districting principles, as evidenced by its shape, then it must have been influenced by unaccepted ones. The Supreme Court explicitly approved this inferential approach because legislative intent is notoriously difficult—if not logically impossible [23]—to ascertain, and in redistricting cases, the district itself may provide the only firm evidence, albeit circumstantial, of that intent. What the Supreme Court did not do is imbue geography with constitutional significance; the requirement for a successful Equal Protection claim is still *intent*, however proved. Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation is not what *Shaw* intended. That approach would make district shape a (previously unheard of) threshold to constitutional claims.[24]

2. The Eleventh Congressional District

This stage of our analysis is the easiest to resolve. The amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District

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[23] *See Rogers v. Lodge,* 458 U.S. 613, 631-53 (1981) (Stevens, J., dissenting). Justice Stevens has succinctly stated the problem: "A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington v. Davis,* 426 U.S. at 253 (concurring opinion).

[24] Note that a bizarre district shape is indeed a "threshold" for purposes of standing. Without the "harm" caused by an obvious gerrymander, citizens have no basis for suit. See supra, section II.A.1.

is overwhelming, and practically stipulated by the parties involved.

a. Indirect Evidence

The current configuration of the Eleventh District appears in Joint Exhibit 1. For our purposes, the most significant elements of the Eleventh are the "land bridges" to Dekalb, Richmond and Chatham Counties. On a purely visual level, it is exceedingly obvious to us, and more importantly, to the public, that extraordinary efforts were made to reach those areas for a specific *purpose*; narrow appendages reach out from the core of the Eleventh to grasp certain goals—the cities of Atlanta, Augusta, and especially Savannah.

Land bridges are not the only bridges which support the Eleventh District's march. The Eleventh soars 18 stories over the water upon the spine of the suspension bridge at Savannah to spill itself over uninhabited Hutchinson Island (which many travelers think is in South Carolina). From Hutchinson the district goes northwest across the marshes, a wildlife refuge, and the river again (this time without a bridge) to a mere point of contiguity with Effingham County. By this means most of the Port facilities are left within the First (historically coastal) District.

The surrounding evidence implies that this specific purpose, sometimes the only purpose, was race. Consider the extension into Effingham and Chatham Counties: From intact Screven County, the Eleventh suddenly narrows to a bridge at points barely contiguous and averaging less than two miles in width, until it reaches the City of Savannah, where it branches out to encompass particular sections of that

community. *See* Joint Exh. 1; DOJ Exh. 10, 16-17. Effingham County is actually a growing area, but the part of it within the Eleventh District is largely swamp.[25] In most of that strip, the population is literally "zero." Tr. I, at 107 (testimony of Linda Meggers). In Savannah itself, the sections within the Eleventh are heavily populated—with blacks. DOJ Exh. 17. Chatham County is 38% black; that part of it within the Eleventh is 84% black. Majority white areas of Savannah are circumvented by the district boundaries.[26] *Id.*; Tr. I, at 115-16.

The Court has not been presented with an adequate non-racial rationale for this spectacle. The extension to Savannah is not compact by any credible definition of that term,[27] it was not necessitated by natural geographic boundaries, there was no incumbent served by it, there was no economic or political interest thereby enhanced, it split two counties, and it was not necessary to comply with the constitutional one person/one vote requirement. It was urged that many of the district lines follow precinct lines, thus

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[25] The Brooks/McKinney max-black plan employed a wider bridge through Effingham County. During the legislative process, the representative from that area succeeded in narrowing the bridge, to minimize the damage caused in splitting Effingham County by keeping as much of the resident population within the adjacent First Congressional District as possible.

[26] In eliminating some of the county splits present in the max-black plan, Ms. Meggers was forced to create even more irregular boundary lines in urban areas, in an effort to include black populations to offset increased white populations in the repaired counties. Tr. I, at 97.

[27] We further explore the concept of "compactness" in our discussion of narrow tailoring, section II.C.3, infra.

providing a "political," non-racial, explanation for their configuration. While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level. Tr. II, at 271-72.

The Court was also plied with testimony about "communities of interest" involving the black populations of Savannah and other majority-black areas, *e.g.*, Tr. VI, at 26 et seq. (testimony of Rev. Mitchell), 137 et seq. (testimony of Dr. Marsha Darling), that allegedly provide a non-racial justification for the district's current configuration. Here the Defendants and Intervenors faced a Sisyphean task. Initially, the desire to bolster amorphous "communities of interest" could not be sufficient justification for the drafting gymnastics involved in bringing the Eleventh District to Savannah. Second, we remain unconvinced that the poor black populations of coastal Chatham County feel a significant bond to the black neighborhoods of metro Atlanta. Third, even if bonds between these groups exist at certain levels, those links were certainly not the overriding motivation behind construction of a land bridge to Chatham County.

Finally, and most importantly, the Defendants and Intervenors spent much time outlining the racial community of interest shared by black citizens in Georgia. The problem with this tack is that, while partially convincing, such a community of interest is barred from constitutional recognition. To urge this racial identification as a justification for the shape of the Eleventh District is tantamount to simply admitting that race was the overriding consideration in its creation. We have no doubt that black citizens

share concerns related to their condition as blacks, *e.g.*, the unusually high crime rate in black communities or combatting racism. Rev. Mitchell presented evidence of religious networking among black congregations. A voting district, however, that is configured to cater to these "black" concerns is simply a race-based voting district. It is based on superficial, racially founded generalizations about what matters to black Georgians. That is, it trafficks in racial stereotypes. We find it ironic and troubling that the state and federal government should expend such effort to convince the Court "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 113 S.Ct. at 2827.

Richmond County also shows signs of gerrymandering. From Burke County, the Eleventh District suddenly narrows to a corridor, following the Central Georgia Railroad into the City of Augusta. The corridor, composed of wetlands and some industrial areas, is virtually unpopulated. DOJ Exh. 14; Tr. I, at 100. Upon reaching Augusta, the Eleventh cuts through the city itself, splitting precincts and roping in the heaviest concentrations of black citizens. Richmond County is 42% black; that component inside the Eleventh District is 66% black.

Dekalb County, containing the largest single concentration of blacks in Georgia, suffers a similar fate. From Butts County, the Eleventh gradually narrows to a point less than one half mile wide, and then broadens to cover all of Atlanta's black populations not "needed" for the Fifth District. Tr. I, at 119; DOJ Exh. 8. Dekalb County is only 42.2% black;

its constituency within the Eleventh District is 74.6% black.

The narrow section of the district, just south of DeKalb County, provides a clear example of a point we noted earlier. Ms. Meggers, forced to include the black populations of DeKalb County in order to reach the correct black voting age population in the Eleventh District, narrowed the Eleventh to a half mile along the way in order to follow precinct lines. She did this because it was possible, and splitting of precinct lines is generally avoided where possible. Tr. I, at 122-23. Yes, precinct lines provide a nonracial explanation for a district boundary, but, as Ms. Meggers stated, she was "just lucky"; the overriding reason for cutting through that area in the first place was to scoop up black voters. *Id.* at 82. The fact that Ms. Meggers minimized the damage does not undermine that central motivation.[28]

Other observations shed light on the racial manipulations behind the Eleventh, most notably the simple one that the total black population of Georgia is 26.96%, while within the Eleventh it is 64.07%. We

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[28] Defendants also asserted that, since all districts must comply with the one person/one vote requirement articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964), race could not be the dominant or sole motivation behind a redistricting effort. Our response to this argument is that the one person/one vote requirement is a "threshold" requirement, a first-order requirement that must be addressed before considering second-order factors such as race or any traditional redistricting principles. The one person/one vote criterion is inflexible; it simply must be met by every redistricting plan. In contrast, the prominence of secondary factors will vary with the legislative tides. It is among those factors that we debate the relative importance of race as a motivation. One person/one vote compliance is assumed.

also note that the vast majority—nearly 80%—of the district's minority population comes from carefully divided counties on its distant fringes. In addition, the Eleventh District avoids the heavy black populations of Macon, just 80 miles from DeKalb, while going to great lengths to include those of Savannah, 260 miles away; the black voters of Macon are necessary to make the Second Congressional District majority-black.

Finally, if not for reasons of race, why split the counties of DeKalb, Wilkes, Richmond, Effingham, Chatham, Twiggs, Baldwin, and Henry? Why split 26 counties at all? With the exception of Texes, Georgia has more counties than any other state in the Union; one would think that such a proliferation would provide ample building blocks for acceptable voting districts without chopping any of those blocks in half. Avoiding such rough surgery did not seem such a herculean feat in any redistricting round before 1992. And why excise Savannah—and just portions of Savannah—from its traditional economic place in the "coastal" region of Georgia? The Eleventh District could have been easily revised to include one or more whole counties while still meeting the one person/one vote requirement, and other traditional districting concerns would have been better served.

We find the above survey indicative of an overriding objective to include minority populations in the Eleventh. In fact, with regard to the extensions to Savannah and Augusta, we find that race was clearly the sole objective behind its creation. At a glance, the appendages of the Eleventh are obviously designed to do something; after cursory exploration, it rapidly becomes clear that the "something" is

maximization of black voting strength. As Mr. Armstrong himself admitted, all one must do is

> take a . . . map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflect[] black voting strength.

Tr. IV, at 135. We could not have phrased it better.

b. Direct Evidence

Any attempt to explain the Eleventh District as anything but a far-flung search for black voters utterly collapses under the weight of direct evidence. One need only review DOJ's objection letters and our findings of fact to see that DOJ spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply. The testimony at trial reflects this sorry process, and it is compelling. We need review but a few examples from the record.

The State of Georgia simply confessed to its racial motivations. In response to Plaintiffs' Request, State made the following admissions of fact:

> The State would not have added those portions of Effingham and Chatham Counties that are now in the present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter.

Tr. I, at 11-12. And

> To the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district.

Id. at 12.

Speaker Thomas Murphy also admitted that the Assembly built its third districting plan along racial lines.

> What we did is we went into counties and precincts and picked up pockets of African-Americans to make a strong district with voting age black population so that it would guarantee a black would be elected from there.

Tr. II, at 62. Speaker Murphy stated that the boundaries of Chatham, Richmond, DeKalb, Baldwin, Twiggs, and Wilkes Counties were "all drawn based upon race." *Id.* at 72. He was not alone in his frankness. Every legislator testifying in these proceedings admitted that the objectives behind the districting plan were racial ones. Max-black supporters presumably agreed, including Rep. Cynthia McKinney and various members of the Georgia Black Caucus. Linda Meggers, not an elected official but the architect behind the districts in question, readily stated on numerous occasions that she designed the Eleventh District to root out black populations and avoid white ones. *See* Tr. I, at 106-07 (Chatham County), 101-02 (Richmond County), 124-25 (Baldwin County), 270-71 (DeKalb County), 272-73 (on sole purpose of land bridges as connections to black populations). *See also id.* at 74 (Second Congressional District), 82 (same). Ms. Meggers routinely found the "blackest" precincts first, and then worked backwards by racial percentage. *Id.*

Rep. Sonny Dixon, who "oversaw the extension of the Eleventh District into Chatham County," Tr. IV, at 159, gave powerful and credible testimony on that subject, and was quite clear as to how the current Eleventh District came to be:

> MR. CHESIN [for Plaintiffs]: What was the reason for this extension [into Chatham County]?
>
> REP. DIXON: Purely to, as the Justice Department objection letter stated, to connect the second largest concentration of blacks with the rest of the Eleventh District.
>
> MR. CHESIN: Was there anything else besides race?
>
> REP. DIXON: None whatsoever.

Id. at 159-60. He detailed the extreme efforts made to stretch the Eleventh to Savannah without absorbing any white voters along the way, *id.* at 161-64, and the literally block by block search for black voters to add to the Eleventh District.

Rep. Dixon's testimony presents a picture which, under virtually any other set of circumstances, would be clearly impermissible, almost unthinkable. The concept of government allocations on the basis of race, coupled with drawing lines tracing concentrations of black citizens, smacks of government-enforced ghettoization. The contours of the Eleventh District reviewed above are so dramatically irregular as to permit no other conclusion than that they were manipulated along racial lines. This conclusion is cemented with the copious amounts of direct evidence discussed here. Consequently, we must now determine whether this kind of racial classification is nar-

rowly tailored to comply with some compelling state interest.

C. *Constitutional Analysis*

Race-based laws are subject to strict scrutiny even if "remedial" in nature. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1985) (plurality opinion); *United Jewish Organizations*, 430 U.S. at 172 (Brennan, J., concurring in part). As stated in *Croson*, "[a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493-94. Once revealed as a racial classification, a law can survive constitutional review only upon "extraordinary justification," that is, a showing that the law is both necessary and narrowly tailored to further a compelling state interest. *See Shaw v. Reno*, 113 S.Ct. at 2832; *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

The State Defendants seem to propose only the goal of proportional representation as their compelling justification for the current Eleventh Congressional District. Def. Prop. Findings, ¶ 122. The Intervenors, however, suggest VRA compliance and eradicating the effects of past or present racial discrimination as interests sufficiently compelling to justify Georgia's actions in this case. It is clear to us that the only interest the General Assembly had in mind when drafting the current congressional plan was satisfying DOJ's preclearance requirements. The ar-

ticulated "compelling" justifications appear to be *post hoc* rationalizations. Nevertheless, we will address all possibilities.

1. A Preliminary Issue: Burden of Proof

The burden of proof as to whether race was the overriding consideration behind the current districting plan rested squarely with the Plaintiffs. At the strict scrutiny stage, we agree with the court in *Shaw v. Hunt* that, while burdens of production shift to the Defendants, the ultimate burden of persuasion remains with Plaintiffs:

> In . . . a reverse-discrimination case, as in any other Equal Protection case, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of [the] affirmative action program." *Wygant*, 476 U.S. at 277-78 . . . Proof that the challenged law or policy is race-based gives rise to a presumption that it is unconstitutional and shifts to the state the burden of "demonstrating" that its use of race was justified by a compelling governmental interest. *Croson*, 488 U.S. at 505 (majority). But the burden thus shifted is one of production only, not persuasion[.]

Shaw v. Hunt, supra, at 52-53. Plaintiffs still bear the burden of persuading the court that the State's evidence did not support a finding that the redistricting plan was narrowly tailored to a compelling state interest.

2. Potential Compelling State Interests

a. Proportional Representation

We only briefly address this argument, since (1) we encounter it later in our discussion of narrow tailoring, and (2) it clearly does not provide a state interest sufficient to pass constitutional muster.

Proportional representation simply is not a constitutional requirement. *See, e.g., Mobile v. Bolden*, 446 U.S. at 76 ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization."); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Turner v. Arkansas*, 784 F. Supp. 553, 577 (E.D. Ark. 1991) (listing cases). Nor is it a statutory requirement. *See* 42 U.S.C. § 1973b (prohibiting vote dilution, and stating "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). To erect the goal of proportional representation is to erect an implicit quota for black voters. Far from a compelling state interest, such an effort is unconstitutional. *See, e.g., Regents v. Bakke*, 438 U.S. at 307.

The State believes in a compelling state interest in achieving proportionality apart from any requirement of the Voting Rights Act. State Def. Findings, ¶ 122. In response to an inquiry as to what compelled the creation of racially proportional voting districts, the State's tautological answer is to proffer a desire to draft racially proportional voting districts, and insist that "the Constitution does not prohibit a state from enacting such a plan." True, but neither does the Constitution—nor the VRA—require it. This distinction is stressed in *Shaw v. Reno*, 113 S.Ct. at

2830, and is partially the lesson of *Johnson v. De Grandy*, 1994 WL 285792 (U.S. 1994), on which both the State and DOJ rely. *De Grandy* acknowledges proportionality as a prima facie indication of non-dilution under section 2, and as something to consider within the "totality of the circumstances" surrounding a vote dilution claim. Lack of proportionality may imply dilution, but that inference is far from an independent and compelling state interest in racially gerrymandering voting districts.

b. Eradicating the Effects of Past Discrimination

With the rise of race-based programs intended to remedy the effects of past discrimination, it became necessary for the Supreme Court to decide when a history of "societal discrimination" provided a sufficiently compelling state interest for the law in question. A generalized claim of societal discrimination cannot justify a racial classification. *Wygant*, 476 U.S. at 276. There must be some "particularized findings" of past discrimination, providing a "strong basis in evidence" for the state's conclusion that remedial action is necessary. *Id.*; *Croson*, 488 U.S. at 500, 504 (majority opinion).

Such a finding might be possible in our case; we have given formal judicial notice of the State's past discrimination in voting, and have acknowledged it in the recent cases. *See Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1560-61, 1571 (S.D. Ga. 1994). *See also Rogers v. Lodge*, 458 U.S. 613 (1981). The problem is that (1) the General Assembly never articulated such lofty goals during the 1990-92 redistricting, having made clear that it would not have enacted the current plan but for DOJ de-

mands, and (2) we conclude that a compelling state interest in remedying prior discriminatory voting practices does not exist independent of the Voting Rights Act.

The Supreme Court declined to fully explore this latter issue in *Shaw v. Reno*, but did take time to "note" that

> only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial block voting apart from the requirements of the Voting Rights Act. And those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles," and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority."

Shaw, 113 S.Ct. at 2832 (quoting *UJO*, 430 U.S. at 167-68) (opinion of White, J., joined by Stevens and Rehnquist, JJ.). Justice Brennan concurred in *UJO*:

> [I]f and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act.

Id. at 175. We take our cue from both the *Shaw v. Reno* majority's caveat and Justice Brennan's faith

in the Voting Rights Act as a justification for race-based legislative preferences. The VRA is an expansive remedial scheme imposing federal authority over much of the country's state and local voting systems. In effect, it formalizes, codifies, and universally imposes a "compelling state interest" to redress historically persistent discriminatory voting practices. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 310-15 (1965) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."). Under the guise of section 5, it even directs that "state interest" to those regions where it is most "compelling."

Any independent state interest in the remedial revision of voting laws is subsumed within that broad federal legislation. If a state's remedial program meets the requirements of the VRA, an independent compelling justification is redundant; if the program exceeds the requirements of the VRA, the separate interest in further increasing minority voting strength is no longer compelling. The VRA places a necessary leash on race-based remedial practices in the voting sphere; the Supreme Court has acknowledged that remedial legislation can cause more harm than good, and requires such laws to be narrowly tailored and clearly linked to specific instances of past discrimination. *See Wygant*, 476 U.S. at 274-76 (requiring a "strong basis in evidence" for any proffered state interest in rectifying prior discrimination); *Bakke*, 438 U.S. at 298 (observing that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor bearing no relationship to individual worth."). Considering the unparalleled significance

of the right to vote, this implicit regulation is beneficial to the nation. The VRA ensures that states honor the right to vote; our recognition of no other compelling justification for race-based voting remedies ensures that states do not go too far.[29]

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[29] In contrast to our view, the majority in *Shaw v. Hunt* found recognition of a compelling state interest beyond the VRA necessary because the VRA might not reach all instances in which race-based redress is needed. They presented the example of a state that

> has a history of official racial discrimination in its electoral system, which has resulted in the virtual exclusion of members of a particular racial minority from participation in its political processes, but it knows that the creation of majority-minority districts is not required by the [nonretrogression element] of section 5, because it has never had such districts before, and that the relevant minority group cannot show that section 2 requires the creation of any majority-minority districts, because it is too widely dispersed to constitute a majority in a single-member district that is "geographically compact" under *Gingles*.

Shaw v. Hunt, supra, at 71-72. Our response is that this hypothetical state rightly has no compelling interest in gathering together its widely dispersed minority population. To do so, it would have to traffick in a superficial stereotype impugned by *Shaw v. Reno*—that widely dispersed black populations will vote alike simply because they are black. The vote dilution provisions of the VRA implicitly recognize this point by not requiring a different result. Minority populations must be "geographically compact" before a successful section 2 claim can be made, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), and this requirement is designed precisely to bar such claims where the minority population is "substantially integrated" or "spread evenly" throughout the challenged district. *See id.* at 50 and n.17. Finally, we are here presented with a textbook example of "hard cases" making "bad law," *Northern Securities Co. v. United States*, 193

c. VRA Compliance

The *Shaw v. Reno* majority stops short of declaring that compliance with the Voting Rights Act is, a fortiori, a compelling state interest. The Court allows that "[t]he States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and applied." *Shaw*, 113 S.Ct. at 2830. Fully steeped in the argot of constitutional law, we do not doubt that the Court intentionally avoided the word "compelling," instead opting for the more cautious "very strong." This suggests to us that VRA compliance might be a compelling state interest under some circumstances, but that there are certain necessary predicates; the Court warns that a redistricting plan satisfying section 5 may still be found unconstitutional, and that legislatures are not thereby granted "carte blanche to engage in racial gerrymandering [.]" *Id.* at 2831 (citing the VRA itself and Supreme Court precedents). Beyond these cautionary observations, no explicit guidance is given as to when VRA compliance constitutes a compelling state interest.

A most useful hint, however, comes from Justice O'Connor's injunction that courts "bear in mind the difference between what the law permits, and what it requires." *Id.* at 2830. Essentially, the point here is that the VRA cannot justify all actions taken in its name. It will present a compelling justification for certain race-based remedial measures, but not for all that its provisions might potentially "permit."

U.S. 197, 363 (1904) (Holmes, J., dissenting); the improbability of the above scenario indicates its dubious value as scaffolding for constitutional arguments.

The court in *Shaw v. Hunt* translates this aspect of *Shaw v. Reno* into a useful standard:

> We think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.

Shaw v. Hunt, supra, at 56. *See Hays I*, at 1217 (concurring opinion). That court arrives at this interpretation by marrying the standard for determining if past discrimination provides a compelling state interest with recent Supreme Court pronouncements on remedial race-based measures. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (requiring "particularized findings" of societal discrimination before concluding that a compelling state interest exists for remedying it); *Croson*, 488 U.S. at 491 (considering remedial actions in contracting); *Bakke*, 438 U.S. at 307 (considering educational affirmative action programs). This standard makes sense, but is indicative of a puzzling component of *Shaw v. Reno* explored below.

i. The Effect of *Shaw v. Reno* on the Strict Scrutiny Standard in the Context of VRA Compliance

If we assume that the VRA is constitutional,[30] and that it does, as *Shaw* strongly implies, provide suffi-

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[30] No risky assumption. *See, e.g., Chisom v. Roemer*, 501 U.S. 380 (1991) (upholding constitutionality of "purpose" requirements of VRA sections 2 and 5); *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966) (holding that Con-

ciently compelling justification for race-based redistricting in *some* contexts, then the narrow tailoring stage of the constitutional analysis logically overshadows the compelling interest stage as the vital point of contention. The *Shaw v. Hunt* standard reflects this shift: it is unlikely, especially considering DOJ's current standards for preclearance under section 5, that a state could not provide solid evidentiary support for concluding that its redistricting efforts were "necessary." As the North Carolina court argues, rejection of a redistricting proposal by DOJ or the D.C. District Court would constitute "a strong basis in evidence" justifying increasingly race-based redistricting. Indeed, such measures would then appear "necessary" for VRA compliance, since preclearance would not otherwise be forthcoming.

A "prima facie" compelling state interest would thereby be created, "prima facie" because the race-based measures have not been verified as necessary; it is only the State defendant—and DOJ—that assert as much. To determine if such was indeed the case, a court would have to pursue a narrow tailoring inquiry, and decide whether the districts, as precleared and enacted, were genuinely "reasonably necessary," *Shaw*, 113 S.Ct. at 2831, that is, narrowly tailored, to comply with the VRA. If they were not found actually necessary, then the State—and DOJ—were wrong in deciding that they were, and suddenly no compelling interest existed; if the measures were found necessary, then both DOJ's interpretation of the VRA and the State's adherence

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gress did not abuse its power in creating preclearance requirement under VRA section 5, since it was a "legitimate measure" taken under "compulsion of . . . unique circumstances").

to it had [*sic*] been correct, and so a compelling interest had [*sic*] existed.[31]

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[31] We disagree with Chief Judge Voorhees that this approach results in a "[b]lind deference to the administrative findings of the United States Attorney General" that confers immunity from "constitutional scrutiny[.]" *Shaw v. Hunt*, supra, dissenting opinion at 25. First, DOJ was expressly empowered by Congress to render section 5 decisions on par with those of the D.C. district court. 28 C.F.R. § 51.52. Labeling them as "administrative findings," *Bakke*, 438 U.S. at 305 (opinion of Powell, J.), does not diminish their potency, and the Supreme Court does not seem to underestimate their importance. *See, e.g., UJO*, 430 U.S. at 175 (Brennan, J., concurring in part). Second, it is obvious that, since DOJ enforces the VRA via its preclearance duties, its demands will dictate what it is "necessary" for the State to do under the Act. Again, Congress realized this when the VRA was enacted. Third, our analysis in the text above demonstrates that no constitutional "immunity" inheres from the standard articulated by the majority in *Shaw v. Hunt*. It does somewhat alter the balance of factors in the strict scrutiny analysis, but the State is granted no added protection thereby. Close examination of potentially compelling interests is simply held in abeyance pending a determination of narrow tailoring. Finally, the Attorney General is not hereby granted "de facto ability to determine the constitutional scope of federal legislation" anymore than she is granted that ability under any other federal law that DOJ is entrusted to enforce.

Shaw v. Reno allows that the VRA is potentially a compelling interest, but only if race-based changes made in its name are "reasonably necessary" to comply with it. Yes, the State can—and should—independently assess whether its plans reasonably satisfy the Act. The State did so in the instant case, and the result was predictable: DOJ's assessment trumped that of the General Assembly, since without DOJ's acquiescence, there are no congressional elections in Georgia. There was no "blind deference" here. Georgia was a reluctant participant.

The end result here is that in scenarios involving jurisdictions subject to section 5, a compelling interest is initially assumed, since the plans in question could not have been enacted without VRA "compliance" as interpreted by the Justice Department. We realize that the *Shaw v. Reno* majority was careful to say that "States . . . have very strong interest in complying with federal antidiscrimination laws *that are constitutionally valid as interpreted and applied*," *Shaw*, 113 S.Ct. at 2830 (emphasis added), and that DOJ's "maximization" interpretation in this case was potentially unconstitutional.[32] The interpretation was improper, however, because it compelled legislative efforts not reasonably necessary/ narrowly tailored to the written dictates of the VRA and attendant regulations, not because it required race-conscious redistricting. We are constantly returned to that crucial tailoring aspect of the strict scrutiny rubric, and our temporary compelling interest assumption is merely a stepping stone to get us there. *Cf. Hays I*, 839 F. Supp. at 1206 (assuming presence of a compelling state interest in order to reach the narrow tailoring stage).

It is not seriously debated that the General Assembly designed the current congressional districts specifically to comply with DOJ's preclearance requirements. Reviewing our factual findings, it is evident that Georgia, wrangling with the DOJ Voting Section for over a year, did what was minimally "necessary" to secure preclearance, and putatively, to comply with the VRA. Consequently, there was a

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[32] We realize that decisions of the Attorney General are not reviewable by this Court. *See Morris v. Gressette*, 432 U.S. 491 (1977).

putatively compelling interest behind the drafting of the current Eleventh Congressional District, pending a final determination of whether DOJ's demands comported with the VRA.[33] We now leave this stage and turn to whether Georgia's 1992 congressional redistricting plan was actually required by the VRA and Supreme Court precedent; the Plan will live or die on the results of our narrow tailoring inquiry.

3. Narrow Tailoring

A variety of factors are generally relevant to whether a state action is narrowly tailored to further a compelling state interest,[34] but in the voting context, the factors are somewhat altered by the presence of the VRA. Our inquiry here will focus on two issues: (1) whether the current plan contains more majority black districts than reasonably necessary to comply with the VRA, and (2) whether the existing majority black districts contain larger concentrations of minority voters than reasonably necessary to give those voters a realistic opportunity to elect candidates of their choice. *See Shaw v. Hunt*, supra, at 75-76; *Hays I*, 839 F. Supp. at 1206-08.

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[33] "Reliance on possibly invalid applications of the Voting Rights Act by the Department of Justice cannot create a [genuinely] compelling state interest. If so, the Department of Justice and various States could sidestep the holdings of *Croson*, *Gingles*, and *Shaw* with ease." *Hays I*, 839 F. Supp. at 1217.

[34] These factors include (1) the necessity of the measure, (2) the efficacy of alternative, race-neutral measures, (3) the availability of more narrowly tailored options, (4) the flexibility and duration of the measure, and (5) the impact of the measure on the rights of third parties. *Hays*, 839 F. Supp. at 1208, 1215. *See Croson*, 488 U.S. at 510-11; *United States v. Paradise*, 480 U.S. 149, 171 (1987).

a. The Significance of Maximization

A congressional districting plan is not narrowly tailored if it affects the rights and interests of citizens more than "reasonably necessary" to further the compelling state interest advanced by the state. *See Shaw*, 113 S.Ct. at 2831 (setting out "reasonably necessary" language); *Hays I*, 839 F. Supp. at 1208 (describing this element as the "essence of narrow tailoring in the redistricting context"). *Shaw* draws a comparison with *UJO*, where four justices decided that New York's creation of additional majority-minority districts was constitutional, because the plaintiffs had *failed* to show that the state "did more than the Attorney General was authorized to require it to do[.]" 430 U.S. at 162-63. In other words, plaintiffs failed to show that the State's plan did more than was necessary to satisfy the compelling interest in complying with the VRA. That showing is much easier here, where DOJ stretched the VRA farther than intended by Congress or allowed by the Constitution, and had the General Assembly firmly in tow.

On first appraisal, our factual finding that the Georgia plan reflects a DOJ maximization agenda[35] bodes ill for any arguments that the Eleventh District is narrowly tailored to comply with VRA requirements. Consider the regulations promulgated by Congress to assist DOJ in properly enforcing the Act.

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[35] We are by no means the first Court to criticize DOJ's maximization propensities. *See Shaw v. Hunt*, supra, Dissenting Opinion; *Hays I*, 839 F. Supp. at 1196-97 n.21; *Turner v. Arkansas*, 784 F. Supp. at 561 (quoting Abigail Thernstrom, *Washington Post*, Sept. 23, 1991, at A11).

Among the numerous racial factors specific to redistricting, DOJ must also consider

> (e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.
>
> (f) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.

28 C.F.R. § 51.59. Congress intended these two criteria as indicators of whether a legislature was attempting to gerrymander in favor of *white* voters, but they are equally useful tools in our context. We will not rehash our factual recitation here, but observe that DOJ clearly disregarded these intended restraints on gerrymandering. DOJ's requirements, based on the max-black proposal, had nothing at all to do with any criterion but race. *See* Pltf. Exh. 2, 4, 6 (DOJ objection letters). Some fundamental "objective redistricting criteria," like the one person/one vote, single-member, and contiguity requirements, were satisfied along the way, but every factor that could realistically be subordinated to racial tinkering in fact suffered that fate. The district is not compact, it disregards economic boundaries, and it ignores county and precinct lines at will when needed to reach black neighborhoods.

We find it ironic that Congress was apparently worried that the legislature might ignore alternative plans that were able to boost black voting strength while satisfying legitimate nonracial interests. Here,

it was DOJ that demanded an alternative plan that boosted black voting strength and completely ignored legitimate nonracial interests. In a similar vein, Congress uses the word "inexplicably," in subsection (f), apparently envisioning a district with lines unexplainable as anything other than an effort to exclude black voters; here we are confronted with a district unexplainable as anything other than an effort to exclude white voters.

These observations alone lead us to conclude that the current congressional plan is not narrowly tailored to what the VRA actually, reasonably, requires. We continue, however, with a more specific look at the gulf between the VRA and the enacted plan.

b. Section 5 of the Voting Rights Act

Section 5 of the VRA prohibits a State or political subdivision subject to section 4 of the Act from enforcing any change in voting practices unless it has obtained a declaratory judgment from the D.C. District Court that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or has secured preclearance from the Attorney General under the same standard. While the "purpose" prong, essentially eclipsed by section 2 of the Act,[36] requires a showing that the proposed plan was not designed to dilute minority voting strength, the "effect" prong is aimed at barring any redistricting plan that would lead to "a retrogression in the posi-

[36] The only difference is that under the section 5 analysis the burden of proof is not on affected minority groups, but on the jurisdiction seeking preclearance. *See* 28 C.F.R. § 51.52 (placing section 5 burden of proof on "submitting authority").

tion of racial minorities with respect to their effective exercise of the electoral franchise." 28 C.F.R. § 51.54 (a) (making retrogression the standard for finding discriminatory effect under section 5, and citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). *See also McCain v. Lybrand*, 460 U.S. 236, 247 (1984) (making purpose/effect distinction); *Port Arthur v. United States*, 459 U.S. 159, 162 (1982) (discussing purpose prong).

It is abundantly clear to this Court that Georgia's current redistricting plan exceeds what is reasonably necessary to avoid retrogression under section 5. DOJ readily admitted that neither the first nor the second redistricting plan passed by the Assembly had a retrogressive effect on minority voting strength. Tr. V, at 36-38; Pltf Exh. 99 (Requests for Admissions from DOJ). Those first two plans provided for two majority black districts, but the third, current plan—in keeping with the max-black proposals—provides three such districts, prompting us to conclude that three majority black districts are not reasonably necessary to comply with the VRA. The *Shaw v. Reno* majority stated: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 113 S.Ct. at 2831. Having created more majority black voting districts than necessary to avoid retrogression, the State of Georgia enacted a congressional districting plan that was not narrowly tailored to the compelling state interest of complying with the VRA. *Cf. Beer*, 425 U.S. at 141 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have

the 'effect' of diluting or abridging the right to vote on account of race within the meaning of section 5.").

Further, DOJ's admission is not necessary to make clear the lack of retrogressive effect. Under the previous congressional districting scheme, there was one majority-black district among the ten districts in Georgia, or 10% majority-black districts. In a plan with eleven districts, two majority-black districts would constitute 18.18% of the total—quite an improvement.[37] Federal regulations state that "[i]n determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission." 28 C.F.R. § 51.54(b). Apparently, neither DOJ nor the General Assembly used this simple guide to Section 5 compliance.

The current districting plan overstepped the requirements for section 5 compliance because it was designed to secure proportional representation for black voters in Georgia, not adhere to the VRA. Three majority-black districts constitute 27.27% of the total eleven, and blacks constitute 26.96% of the total Georgia population. DOJ used its section 5 preclearance prerogative as a tool for forcing that standard upon the General Assembly, thereby setting an extremely dangerous precedent on at least two counts.

First, as noted earlier, proportional representation is in no way a constitutional or statutory requirement. *See De Grandy*, 1994 WL 285792; *Mobile*, 446

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[37] Under the first and second proposals, the Second Congressional District was a black "influence" district augmenting the black voting strength already harnessed in the Fifth and Eleventh.

U.S. at 55; *Beer*, 425 U.S. at 136. *See also* 42 U.S.C. § 1973b. The Supreme Court has in fact rejected any proposed requirement of proportional representation or vote maximization throughout the history of the VRA. *See, e.g., White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 148-56 (1971). And most recently:

> Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid section 2 litigation. . . . The Department of Justice might require (in effect) the same as a condition of granting preclearance, under section 5 of the Act, 42 U.S.C. § 1973c, to a State's proposed legislative redistricting. *Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against.*

De Grandy, 1994 WL 285792, *17 (Kennedy, J., concurring) (emphasis added). The potential harm of a proportional representation benchmark is not easily overestimated. Such a standard dictates racial quotas for our democratic institutions based on the percentage of each race in the population at large. No, there is no guarantee that majority-minority districts will yield minority representatives, but their conscious construction as entitlements for each racial group causes the societal damage against which we warn today. If efforts to *require* proportional representation of minorities in democratic institutions are not stopped with clarity and force, they will divide this country into a patchwork of racial provinces, and en-

sure that elected officials represent races before they represent citizens. *See Holder*, 114 S.Ct. at 2598-99. The VRA neither intends nor requires the devolution of voting rights into racial bargaining chips to be bickered over by special interests, and we will not support that cause.

Second, while the *Shaw v. Hunt* majority is confident that race-based redistricting plans "are inherently temporary in nature," Majority Opinion at 78, we are equally sure that any redistricting plan designed for proportionality, that is upheld by the Court today, will not be easily uprooted in the foreseeable future. We are aware that the decennial census prompts revisions to many districting plans, but the VRA prevents any voting changes that have a dilutive or retrogressive effect upon minority voting strength. Consequently, any plan approved today will become the absolute baseline for subsequent changes through 2007, 42 U.S.C. § 1973b(a)(7); in 2000, if the Georgia population increases and the Georgia Assembly does not add a fourth majority-black district, surely it will be subject to litigation under section 2 and rejection under section 5. Nor do we find it likely that Congress will commit the wildly unpopular act of substantially revising VRA nondilution and nonretrogression provisions in 1997. *See id.* § 1973(a)(8). The "bailout" mechanism available to jurisdictions covered by section 5 does impose some eventual limit on what is required, *id.* § 1973b(a)(1), but even if released from section 5 coverage, Georgia would not then be free to dismantle its proportionally representative districting scheme. Upholding the plan today would create a fairly permanent race-based electoral system.

c. Section 2 of the Voting Rights Act

Having thoroughly denounced the cause of proportional representation, we do realize that it plays an important role in vote dilution claims under section 2 of the VRA. Without it, there is no statistical norm against which to compare the current state of minority voting prowess. *De Grandy*, supra, at *16 (Kennedy, J., concurring) (citing Supreme Court cases). *See also Holder*, 114 S.Ct. at 2597 ("[T]he mathematical principle driving the results in our cases, is undoubtedly direct proportionality."); Mary A. Inman, *Change Through Proportional Representation: Resuscitating a Federal Electoral System*, 141 U. Pa. L. Rev. 1991, 2050-51 (1993) (arguing that despite the VRA, "the core value underlying *Gingles*' three preconditions is a right to proportional representation—but only for compact, cohesive, and sizable minority groups." (footnotes omitted)). The *De Grandy* majority discusses proportional representation at length, finding that while proportionality is probative evidence that minority voters have an "equal opportunity" to participate in political processes and elect their preferred candidates, its significance "may vary with other facts." 1994 WL 285792 at *11. While sometimes sufficient to show nondilution, it is not required to achieve it. *Id.* at *11-12.

Congress enacted section 2 of the VRA to provide teeth to the Fifteenth Amendment, a constitutional injunction historically spurned by state and local governments. *See Katzenbach*, 383 U.S. at 308 et seq. (reviewing history). Section 2(a) prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or

color[.]" 42 U.S.C. § 1973b. Section 2(b) specifies that section 2(a) is violated if:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. Section 2(a) adopts a "results" test, "providing that proof of discriminatory intent is [unnecessary] to establish any violation of the section. Section 2(b) provides guidance about how the results test is to be applied." *Chisom v. Roemer*, 501 U.S. 380, 395 (1991); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). In the context of single-member voting districts, "the usual device for diluting minority voting power is the manipulation of district lines." *Voinovich v. Quilter*, 122 L.Ed.2d 500, 511 (1993). Minority voting strength might be "cracked," fragmented and dispersed among two or more districts where it constitutes an ineffective minority of the electorate, or "packed," concentrated in one or a few districts where it constitutes an excessive majority, thus "bleaching" the surrounding districts of minority voters. *See id.*; *Gingles*, 478 U.S. at 46 n.11.

Gingles provides the essential framework for establishing a vote dilution claim against at-large, multimember districts; it has since been extended to

single-member districts.[38] *Growe v. Emison*, 113 S.Ct. 1075, 1084-85 (1993). There are three "threshold conditions": (1) that "[the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "that [the minority group] is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. If the plaintiffs in a vote dilution suit establish these conditions, the court then considers other factors relevant to determining whether, "under the totality of the circumstances," minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973b. *See id.*, 478 U.S. at 80. These secondary factors can include a history of discriminatory voting practices, racially polarized voting, the relative presence of minorities in elected posts, and evidence of discrimination against minorities in other aspects of society that might hinder their ability to participate in the electoral process. *Id.* at 36-37. None of these factors are essential to a finding of vote dilution, *id.* at 45, but the Supreme Court has explicitly warned that a judgment must encompass not just the three preconditions, but "a comprehensive, not limited, canvassing of relevant facts." *De Grandy*, supra, at *8. The assessment must be a holistic one.

Shaw v. Reno provides little guidance for deciding whether an existing districting plan is narrowly

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[38] Justice Thomas has highlighted some profound difficulties with the *Gingles* analysis, *Holder*, 114 S.Ct. at 2615-18, but this Court is bound to apply it. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

tailored to the goal of section 2 compliance. *See Shaw*, 113 S.Ct. at 2831-32. The logical approach is to begin by determining whether historical, societal, and demographic conditions in Georgia at the time of redistricting sufficed under the *Gingles* preconditions to reasonably necessitate creating the Eleventh Congressional District. If so, the General Assembly had a compelling interest in designing the plan as it did.

i. Is the Eleventh Congressional District Required by Section Two?

Any determination of whether three districts were necessary to avoid vote dilution sports prodigious amounts of statistical baggage. The court heard from seven experts on the virtues and vices of the district,[39] on topics including compactness, communities of interest, racial polarization in voting, the minimum demographic requirements of a reasonable majority-black district, and Georgia's racist past.[40]

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[39] We include Ms. Meggers in our count; being a veteran practitioner of redistricting, she is more intimate with the subject than any academic commentator.

[40] Traditional districting principles such as compactness, contiguity, communities of interest and respect for political subdivisions are not constitutional requirements, *Shaw v. Reno*, 113 S.Ct. at 2827, but are relevant to our consideration of narrow tailoring. We agree with the North Carolina court that the Supreme Court will probably not

> adopt a definition of 'narrow tailoring' in the redistricting context that requires consideration of whether the challenged plan deviates from 'traditional' notions of compactness, contiguity, and respect for political subdivisions to a greater degree than is necessary to accomplish the state's compelling purpose.

Shaw v. Hunt, supra, at 87. Such a standard would elevate to constitutional status that which was intended only as a

The more arcane machinations of the parties' statistical experts present us with an initial obstacle. Statistical evidence is potentially of great importance in voting rights cases, e.g., *Gingles*, 478 U.S. at 52-61, but the Court has been presented with no particularly dispositive analyses in this case. Drs. Lichtman and Weber—veterans of the *Shaw* litigation circuit, see *Vera v. Richards*, No. H-94-0277 (S.D. Texas, Aug. 17, 1994), *Hays I*, 839 F. Supp. at 1208—launched conflicting assumptions, databases, and bases of measurement, only to be trounced by Dr. Katz, who impugned the testimony of both. The Court, no experts in statistical methodologies and reluctant to base constitutional holdings on numerical niceties,[41] is left with little of use. We deal with each relevant topic as needed, supplementing the expert testimony with case law where the former provides inadequate guidance.

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barometer for determining whether a district adequately serves its constituents. Observance of those traditional principles is also difficult to judge at the exacting level required for a narrow tailoring determination, and such judging would force the judiciary to meddle with legislative prerogatives to an undesirable degree. *See id.* at 88-94.

Nothing, however, precludes the Court from considering traditional districting principles as guideposts in a narrow tailoring analysis; while not required, they are potentially useful indicators of where the legislature could have done less violence to the electoral landscape. Compactness, for example, is a principle directly relevant to section 2 compliance, which in turn is a central component of our narrow tailoring inquiry.

[41] Dr. Katz's report reveals some of the potential difficulties in relying on statistical data. *See* Rpt. at 10.

ii. On Compactness

Our first consideration is geographical compactness —one of the preconditions to a section 2 claim. Unfortunately, there is no litmus test for compactness; it has been described as "such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." Tr. IV, at 282. *See also Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (stating that compactness requirements have been of limited use because of vague definitions and imprecise application); B. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 85 (1985) (reviewing measures of compactness and stating that none are accepted as definitive). Various mathematically based measures have been created, none of which yielded clear answers in this litigation. *See* Tr. IV, at 275-288 (testimony of Dr. R. Weber). A few include measuring the ratio of the district's area to the square of the district's perimeter; measuring the ratio of the district's population to the population of the area that would fall inside a rubber band stretched around the district; and measuring the ratio of the district's area to the area of the minimum circle that could circumscribe the district.[42]

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[42] Most of these tests are culled from legal and political science scholarship. *See, e.g.*, R. Pildes & R. Neimi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993); E. Roeck, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. Pol. Sci. 70 (1961). *See also Karcher*, 462 U.S. at 756-58, 756 n.19 (Stevens, J., concurring); T. Goldstein, *Unpacking and Applying* Shaw v. Reno, 43 Am. U. L. Rev. 1135 (1994).

At trial, Dr. Lisa Handley, an expert for the State, presented the innovative if abominably named "meanderingness test" for compactness. This test, formulated by Dr. Handley in conjunction with State's counsel specifically for this litigation, constituted the State's only notable submission on the subject of compactness. The "meanderingness" score measures the irregularity of a district's shape by determining how much of the district can be reached by straight lines emanating from that one point in the district yielding "the highest percentage of direct, straight line accessibility." Rpt. of Dr. Handley, at 8-9. We do not find this test any more useful than the others we have encountered; it measures only a narrow facet of the elusive notion that is "compactness," and it allows for some absurd results. As Plaintiffs noted at trial, this measure would find a pencil-thin district hundreds of miles long 100% compact, since there are no twists or turns to break the straight line measurements. We would add that the "meanderingness test" is especially useless in analyzing the Eleventh District: while the vast—and sparsely populated—core of the Eleventh accounts for the district's favorable score on Dr. Handley's test, the narrow—and densely populated—appendages escape notice. In fact, this test is an excellent means of highlighting the egregiously manipulated portions of any voting district, since those portions will always lie beyond the reach of straight line measurements.

Our criticism of the "meanderingness test" leads us to another genre of compactness considerations: those dealing with population. These measures are far less abstract than those above, and better reveal the deficiencies of the Eleventh Congressional Dis-

trict. They require an assessment of population densities, shared histories, and common interests; essentially whether the populations roped into a particular district are close enough geographically, economically, and culturally to justify them being held in a single district.[43]

A review of the Eleventh District from a population-based perspective confirms that the district is not

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[43] This approach is similar to that of "functional" tests for compactness, like that used by Kathleen Wilde in designing the max-black plan. *Dillard v. Baldwin County,* 686 F. Supp. 1459, 1465 (M.D. Ala. 1988) gives a good example of the functional view:

> By compactness, *Thornburg* does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness. . . . [G]eographical symmetry or attractiveness is . . . a desirable consideration for districting, but only to the extent it facilitates the political process . . . .
>
> [A] district is sufficiently compact if it allows for effective representation. . . . [A] district would not be sufficiently compact if it was . . . so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district.

This view of compactness will occasionally conflict with *Shaw v. Reno,* which places renewed emphasis on actual district shape; post-*Shaw,* the functional approach may improperly devalue geographical measurements.

Regardless, functionally speaking, there is considerable potential for voter confusion in the current Eleventh District, particularly near the borders in urban areas of the Eleventh. Beyond the general assumption in cities that "if you are black you are in the Eleventh, and if you are white you are not," the erratic lines and split counties and precincts do not afford voters ready indications of the district in which they reside.

compact for purposes of section 2 of the VRA. The populations of the Eleventh are centered around four discrete, widely spaced urban centers [44] that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors. Two thirds of the population of the district is concentrated in urban DeKalb, Richmond and Chatham counties. These communities are so far apart that DOJ's insistence that they are "compact" renders the term meaningless. The hooks, tails and protrusions of those counties reveal the true "shape" of the district: if it were graphically depicted and sized according to the density of population, the miniature polyp of South DeKalb County would become a large bulbous affair accounting for about 35% of the district's size; the narrow hook into Richmond County would be a rather uncouth polygon sporting about 16% of the district's girth; and the tuft attached to the tail extending to Chatham County would represent 12.4% of the district. Finally, the proboscis extending into Baldwin County would be another distant repository of Eleventh District population.

As for finding any connection between these discrete clumps of people, Dr. O'Rourke, an expert for the Plaintiffs, presented the Court with compelling evidence of economic conditions, educational backgrounds, media concentrations, commuting habits, and other aspects of life in central and southeast Georgia making it exceedingly clear that there are no tangible "communities of interest" spanning the hundreds of miles of the Eleventh District. Rpt. of

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[44] Atlanta, Augusta, Savannah, and Columbus.

Dr. O'Rourke; Tr. III, at 99. Nor would your average citizen think there would be. Assertions to the contrary are the result of shallow and offensive thinking: blacks live in Savannah, blacks live in Atlanta, and so there *must* be *some* deep cultural bond between them since, after all, aren't they black?

> Far more pernicious has been the Court's willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well.

Holder, 114 S.Ct. at 2597. As far as *Gingles*' first precondition serves to minimize the effect of this assumption by requiring groups to reside in a compact area, it has done its work today. Blacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths. They take their voting preferences with them.

The Eleventh Congressional District, as constructed, does not satisfy the first *Gingles* precondition, and was not reasonably required by section 2 of the VRA. There simply is no sufficiently large, compact minority population in south-central Georgia warranting creation in that area of a single-member, majority-black district as a vote dilution remedy. *Cf. Shaw v. Reno*, 113 S.Ct. at 2827. For the sake of thoroughness, we now turn to other factors relating to the second and third *Gingles* preconditions.

iii. On Racial Polarization and Overly Safe Districts

We now move from reviewing the need for an Eleventh District to examining the need for the current racial configuration of its constituency. The Court was here subjected to especially mind-numbing and contradictory statistical data. A team of court-appointed statisticians and political scientists would be hard pressed to divine from the evidence a single concrete finding regarding racially polarized voting, crossover voting patterns, or the minimum black voting age population reasonably required under the VRA to ensure "equal opportunity" for black voters in Georgia. Moreover, we are dubious of arguments based on elusive "benchmarks" for the "appropriate" amount of minority voting influence, and of the judiciary's competence to resolve such disputes. The benchmark concept is rife with difficulties, and tolls a dangerous evolution in voting rights jurisprudence. *See, e.g., Holder*, 114 S.Ct. at 2594 ("[I]n setting the benchmark of what 'undiluted' or fully 'effective' voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory."). We feel, however, constrained to the task.

The "bivariate ecological regression methodologies," "extreme case analyses," "r-squared coefficients," and "frequency distributions" cough up basically two types of statistical information. First, we have analyses of the degree of racial polarization in Georgia voting. Regression and extreme case analyses are the primary research methods here, and Dr. Lichtman, for the United States, uses them to prove the existence of polarization in Georgia. Drs. Weber and

Katz also implicitly or explicitly acknowledge the presence of racially polarized voting, but dispute the extent and significance of its existence. All that is clear from the evidence is that some degree of vote polarization exists, but not in alarming quantities. Exact levels are unknowable. Unfortunately, such a finding is not particularly useful, and tells us nothing about the racial percentages needed within a single-member district to "rectify" the problem.

In addition, we also find a significant degree of crossover voting in Georgia and the Eleventh District, with white voters slightly more willing to vote for black candidates than black voters for white candidates. Rpt. of Dr. Katz, Table 2. The average percentage of whites voting for black candidates ranged from 22% to 38%; the average percentage of blacks voting for white candidates ranged from 20%-23%. Black and black-preferred candidates in Georgia have achieved many electoral victories in local and statewide elections and have received significant—occasionally overwhelming—support from both black and white voters within the Eleventh Congressional District. As with our vote polarization findings above, our observations here are not overly useful on their own. However, the very lack of solid evidence of black vote cohesion or rampant bloc voting, i.e., vote polarization, contributes to our conclusion that the current Eleventh District was not an appropriate section 2 remedy.

The second type of information we cull from the available evidence is geared towards determining the actual percentages needed to give black voters in a certain district an equal opportunity to elect their candidate of choice. At first glance it appears that

the 60.36% black voting age population of the Eleventh is excessive; the Second and Fifth Districts have 52.33% and 57.47% black voting age population, respectively. Both the Second and Fifth were sufficiently majority-black districts to satisfy DOJ, and so presumably the VRA.

Statistically speaking, reconstituted election results from precincts within a certain district, actual prior election results from a certain district, and frequency distributions are the primary methods used to estimate the percentages needed to give black voters an equal opportunity to elect a candidate of their choice. Exact numbers are not available in this context, and the State did not make any inquiries during its redistricting efforts that might have informed its choice of what black voting population percentage was needed. As Ms. Meggers testified, the "traditional" 65% rule governed: as a rule of thumb, it was thought, 65% black total population was needed in a majority-black district, because approximately 5%+ of blacks were not of voting age population, 5%+ were unregistered even if of voting age, and some blacks could be expected to not vote, regardless of status. Thus, the black voting strength was "really" slightly over 50%. We will not base a determination of narrow tailoring—a finding of constitutional magnitude—on such a broad generalization.

That said, the expert testimony is extremely sparse on the numbers needed in the Eleventh to ensure equal opportunities for minorities. First the experts examine actual results from the 1992 election in the Eleventh Congressional District. Black candidates were supported in several stages of the election to varying degrees, but the results of a single election

provide little basis for sound generalizations. We note that in the 1992 Democratic primary, black candidates in the Eleventh District received approximately 55% of the white vote, signifying to us a general willingness of white voters to vote for black candidates. Cynthia McKinney (who is black), receiving 56% of the vote, won in the runoff election against George DeLoach (who is white). Rep. McKinney received 23% of the white vote in the runoff.

Dr. Lichtman presented reconstituted election analyses involving two elections: the 1988 Democratic presidential primary, and the 1990 Democratic gubernatorial runoff. *See* Rpt. of Dr. Lichtman at 36. When the results in these two elections are "recompiled" for the present Eleventh Congressional District, black candidate Andrew Young would have prevailed in the gubernatorial runoff by a margin of 58% to 42%, and black candidate Jesse Jackson would have prevailed in the presidential primary by a margin of 68.1% to 31.9%. *See id.* at 37; Rpt. of Dr. Weber & Supp., Attach. F. Dr. Weber's extended reconstituted election analyses indicate that the black candidate(s) of choice have received a total of 65.7% of the vote in ten elections held entirely within the precincts of the current Eleventh Congressional District.

Dr. Joseph Katz presented the final evidence on the percentages necessary to grant black voters equal electoral opportunities. This evidence is actually the most useful to us; the State seems to have retained Dr. Katz for the unusual purpose of undermining the testimony of both Intervenor United States' expert Dr. Lichtman and Plaintiffs' expert, Dr. Weber. He was largely successful. Dr. Katz questioned the as-

sumptions made by Drs. Weber and Litchman, and his efforts were intended to show that while the current plan did give minorities a "reasonable" opportunity to elect their candidates of choice, the plan was not compelled by the VRA. *See* Tr. V, at 73; State Def. Prop. Concl. at ¶¶ 108-13. Dr. Katz offered several frequency distributions plotting prior election results to determine the probability of a black candidate winning a future election given a certain percentage of registered black voters. Though the analysis is sound and relatively straightforward, its value is diminished by the use of databases from state-wide elections rather than from specific areas within the state; it cannot account for varying voting patterns in the specific regions pertinent to this case. The analysis also measures only the probability of a black candidate winning, not of a *black-preferred* candidate winning. Since only black candidates' success is plotted, using the distribution as a predictor requires the unsubstantiated assumption that a black candidate will always be the candidate of choice of black voters in future elections, and ignores the historical preferences of black voters in all-white elections.

Finally, the value of the analysis is lessened by the use of *registered* black population rather than *voting age* black population as its independent variable. Voting age population—those persons eligible to vote—is the proper measure of whether black voters have an equal opportunity to elect candidates of their choice, not registered population, which is only that segment of the population that actually decides to participate. *See Growe v. Emison*, 113 S.Ct. 1075, 1083 n.4; *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1051 (D. Md. 1994) (citing cases). The VRA guarantees "the right to

have free and equal access to the ballot box and to have the vote that is cast count the same as any other person's," but the Act "does not endow the voter with the right to have his or her vote cast for the winner." *Smith v. Brunswick County*, 984 F.2d 1393, 1398 (4th Cir. 1993). Accounting for lower voter registration and turnout rates among black citizens when determining what constitutes an "equal opportunity to participate in the electoral process," *Gingles*, 478 U.S. at 44, and creating "safe black districts" to compensate for those rates amounts to an incentive for and institutionalization of black voter apathy. That we will not condone. As the Supreme Court has recently said, "minority voters are not immune from the obligation to pull, haul, and trade," *De Grandy*, 114 S.Ct. at 2661, and, this Court adds, "the obligation to register and vote." We are troubled, therefore, by analyses founded on black voter registration rather than black voting age population.

Even considering these shortcomings, Dr. Katz's frequency distributions are the most useful and credible guide to estimating the black population percentages needed in the Eleventh Congressional District. Defendants and Intervenors seem to agree that the frequency distributions are the only real basis in evidence for estimating the percentages required, and their proposed conclusions of law on the narrow tailoring issue implicitly or explicitly refer to this data. The data indicates that a black candidate in Georgia would have an "equal" chance of being elected in a district containing 45-50% black registered voters. *See* Rpt. of Dr. Katz, at Tab 5 (all charts). Georgia's Eleventh Congressional District has a black *registered* voter percentage of 57%, Def. Joint Exh. 21, providing a black candidate a roughly 73% probability of winning an election in that dis-

trict. *See id.* An assessment of black *voting age* population would presumably yield an even higher probability. Defendants' tacitly acknowledge that this is more than an "equal" chance of election, but they propose that it nonetheless presents a "reasonable" opportunity for blacks to elect a candidate of their choice. We are only concerned with the former assessment: the probability afforded by the current Eleventh District represents more than an "equal" opportunity, and is in excess of that required by section 2 of the VRA.

The record fails to demonstrate compactness, chronic bloc voting, or reasonably necessary black voter percentages in the Eleventh Congressional District. Since the district does not satisfy the *Gingles* preconditions, we do not review the "totality of the circumstances." The Eleventh District is not narrowly tailored to comply with the putatively compelling interest of section 2 compliance.

In sum, the current districting plan is not reasonably necessary to comply with sections 2 or 5 of the VRA. Since no compelling state interest other than VRA compliance is evident, the plan fails strict scrutiny under the Fourteenth Amendment. We finally conclude and declare that Georgia's Eleventh Congressional District is unconstitutional in its current composition. The State of Georgia is hereby barred from using it in future congressional elections.

III. RELIEF

Elected governments are obviously entrusted with enormous responsibilities, and when confronted with fundamental issues of race and democracy, they are obliged to govern with insight and care. Our prolonged mediations on compactness scores and fre-

quency distributions threaten to obscure the important point that "narrow tailoring to accommodate a compelling state interest" does not mean a wooden, mechanical application of one remedy while ignoring all alternatives. Single-member majority-black districts are not a constitutional or statutory requirement. The assumption that the sole means of enhancing blacks' political influence is to pack them into such districts is unimaginative.

The time has come to contemplate more innovative means of ensuring minority representation in democratic institutions. Otherwise, the United States face[s] a steady transmogrification into racially balkanized voting units. The Court, however, will not lead the pursuit for answers, for we are in agreement with Justice Thomas that

> under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the "correct" theories of democratic representation, the "best" electoral systems for securing truly "representative" government, the "fairest" proportions of minority political influence, or . . . the "proper" sizes for local governing bodies.

Holder, 114 S.Ct. at 2602. Voting reform is the province of legislatures; Georgia's owes its citizens new solutions.

No congressional elections will be held in the Eleventh Congressional District until it is revised in keeping with our decision today. This is a permanent injunction. The Court will initially reconfigure the district with the aid and assistance of the personnel and equipment of the State Reapportionment Services of-

fice. Such revision will surely affect the First and Tenth Congressional Districts, but there is little chance that the Court's order will affect other districts in Georgia. The original parties and the Abrams Intervenors are invited to submit written, statistical, and graphic suggestions (not to exceed a total of 25 pages per party) to this Court, no later than September 26, 1994. The parties' submissions should be as narrowly conceived as possible to satisfy constitutional requirements, and cause minimal disruption to the political process of the State of Georgia. A hearing on redistricting remedies will be held in Savannah at 9:00 a.m. on October 3, 1994. After this Court's order for relief as to the 1994 congressional elections, Georgia officials may wish to revisit the issue of reapportionment in the affected districts, or statewide. That decision rests with the State.

CONCLUSION

Accordingly, it is HEREBY ORDERED that congressional elections in Georgia's Eleventh Congressional District are ENJOINED until further order of this Court. It is further ORDERED that this Court reserves decision and jurisdiction to reconfigure the Eleventh Congressional District in a manner consistent with this opinion and after reviewing the parties' suggestions; this Court also reserves decision and jurisdiction to order the concomitant required modifications to the First and Tenth Districts as the need arises.

As an accommodation to the parties and their attorneys, a copy of this opinion shall be lodged with the Clerk of the Eleventh Circuit Court of Appeals simultaneously with its filing in the District.

Entered at Augusta, this 12th day of September, 1994.

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
United States District Judge

for himself and for
B. AVANT EDENFIELD
Chief Judge
United States District Court
Southern District of Georgia

Edmondson, Circuit Judge, dissenting:

At the outset, I cheerfully admit that my colleagues may well be right about what is the correct result in this case. In such circumstances, I (despite my disagreement) usually write nothing in dissent. But, given the exceptional importance of this case to the people of Georgia and to the law of the United States, I feel obliged to explain briefly and generally my view.

Reapportionment of a state's congressional districts is fundamentally the domain of the states rather than the federal courts. *Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993); *Connor v. Finch*, 97 S.Ct. 1828, 1833 (1977); *Reynolds v. Sims*, 84 S.Ct. 1367, 1394 (1964). The Constitution leaves the responsibility for apportioning congressional districts with the states. *Id; Voinovich v. Quiltner*, 113 S.Ct. 1149, 1157 (1993). And, state political considerations pervade the apportionment process making it a "highly complex and multifaceted . . . political thicket." *Reynolds*, 84 S.Ct. at 1385. For example, considerations of incumbency, local politics, and the balance of power between Democrats and Republicans in the state legislature, as well as innumerable other considerations (such as, the simple exchange of votes by legislators to advance each other's goals), control the placement of a state's congressional districts. All legislative action is a product of debate, compromise, and political decisions. The evidence—such as the Lieutenant Governor's testimony—in this case shows that apportionment legislation takes this process to an especially intense level.

Largely because of the uniquely political, sensitive, and complex nature of apportionment, a federal court

hearing a challenge to a state's apportionment plan must give federalism concerns especially significant consideration. The Supreme Court has repeatedly stressed that "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the states, and not the federal courts, to conduct apportionment in the first place." *Voinovich*, 113 S.Ct. at 1157. Federal courts are bound to respect a state's apportionment decisions unless the choices have clearly violated constitutional or federal law requirements. *Id.*[1]

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[1] Plaintiffs in this case attempt to minimize federalism concerns by suggesting that the federal government, acting through the Department of Justice, forced the State of Georgia, that is, the State's elected leaders, to enact the present congressional districting plan. Because Georgia is subject to the preclearance requirements of section 5 of the Voting Rights Act, the Department of Justice does play a role in the enactment of any State plan. *The State, however, always has the option of seeking relief in federal court from the Department's objections.* State leaders bear the responsibility for weighing the advantages and disadvantages of litigation as part of their responsibility for reapportionment generally. But, that the courts are open to Georgia undercuts substantially the idea that the Department of Justice can, in fact, dictate to Georgia. (I note, by the way, that Georgia's Senate had included parts of Savannah—the most controversial element of the Eleventh District—in the Eleventh District before the Department of Justice mentioned such a thing.) In addition, no plan may be enacted unless it is first adopted by Georgia's legislature. The Department's objection to the State's first two plans affected Georgia's ultimate plan. But in the end, the plan before us represents the judgment of Georgia's elected leaders (the main guardians of the public interest for Georgia) on congressional apportionment. And, as the Supreme Court has stated, the State's judgment demands the respect of the federal courts.

With these federalism concerns in mind, I look at *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the precedent that allows, but also limits in important ways, federal judicial action in apportionment cases. Because Congressional apportionment has always been seen as a state matter, only two circumstances historically would allow a federal court to use the Equal Protection Clause as a basis to intervene in the apportionment process: (1) the state's apportionment plan violated one-person, one-vote principles by creating districts with substantially unequal populations, *Reynolds v. Sims*, 84 S.Ct. 1367 (1964); (2) the state's apportionment plan had the purpose and effect of diluting the voting strength of a minority or other identified group of voters, *Wright v. Rockefeller*, 84 S.Ct. 603 (1964). Neither of these circumstances is present in this case.

Therefore, if we are to interfere with Georgia's Congressional plan, from where does our authority come? *Shaw* points to the possible source. *Shaw* held that a congressional district that is "so highly irregular *on its face* that it can be viewed only as an effort to segregate the races for purposes of voting" may be examined by federal courts and, then, be struck down unless the district can survive "strict scrutiny" under the Equal Protection Clause. *Shaw*, 113 S.Ct. at 2828. Highly irregular shape—the appearance of the district—is the critical element of this new cause of action under the Equal Protection Clause. This element strongly limits the power of federal courts to become entangled in state apportionment matters.

Plaintiffs in this case want us not just to follow *Shaw*, but to extend *Shaw* to make federal court intrusion in apportionment cases easier and more

likely. But, there are important differences between following a precedent and extending it. Because extension of *Shaw* as plaintiffs advocate would diminish in important ways the traditional freedom of states to apportion themselves for Congressional purposes without federal judicial supervision, I decline to take that step without plain instruction from the nation's highest court.

Plaintiffs argue that the fundamental inquiry is whether the district has been set up on racial grounds. The burden, they admit, is on them to show that legislators intentionally drew lines to segregate voters according to race. Plaintiffs claim, however, that any evidence probative of the state's decision-making process may be used to prove legislative intent. Under this more active approach, the district's appearance is of little importance; shape is merely one piece of circumstantial evidence proving the legislature's intentional use of race. Other evidence, especially direct testimony from legislators about their motivations, could be used by plaintiffs to prove intent.[2] According to plaintiffs, once they, by any

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[2] During the trial, several State legislators testified about why the Eleventh looks like it does. I accept that each of these men spoke the truth as they know it. But, the main truth (with which I think all agreed) is that, in a democracy, apportionment is a highly political process. Many different agendas may be at work. So, no one person can truly say why other legislators decided to vote this way or that way. I cannot give much weight to post-enactment statements of individual legislators about the subjective motives of the State house, State senate and governor when the apportionment plan was enacted. *See generally Edwards v. Aguillard*, 107 S.Ct. 2573, 2584 n.19 (1987) (finding post-enactment statements "to be of little relevance in determining the intent of the legislature"); *Blanchette v. Connecticut General Insurance Corps.*, 95 S.Ct. 335, 353 (1974) (holding that

means, have shown that race was a substantial factor in the legislature's decisionmaking process, the burden is on the state to show that the district satisfies strict scrutiny. I cannot agree with this more sweeping approach to federal judicial review. The words "on its face" in *Shaw* were not used lightly, I believe.[3] The district's shape is no mere piece of evidence; it is a critical part of the cause of action.

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statements by individual legislators "represent only the personal views of those legislators" and not the intent of the legislature); *National Woodworkers' Mfrs. Ass'n. v. N.L.R.B.*, 87 S.Ct. 1250, 1265 n.34 (1967) (holding that statements made by legislators after a bill was passed "could represent only the personal views of those legislators").

Shaw's highly-irregular-appearance standard is an objective standard, and it, among other things, avoids the unreliability of after-the-fact statements by legislators and also avoids the necessity of federal judges probing and intruding on state officers' thoughts (perhaps expressly crediting some state officers and not crediting others—a divisive event) to "learn" the state's true intent.

[3] No fewer than six times the *Shaw* Court repeats that a district may be challenged on the grounds that it is "bizarre," "highly irregular" or "irrational on its face." *Id.* at 2824, 25, 26, 29, 32. That the Court presented the issue in this manner cannot be ignored. To hold that the proper inquiry is simply whether race was a "substantial factor" ignores the plain language of the opinion. Instead, to follow *Shaw*, a court must ask whether the district is *so bizarre on its face* that only racial considerations could account for its shape.

And, I consider the Court's discussion of *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 97 S.Ct. 996 (1977) (*UJO*), enlightening. In *UJO*, the Court upheld a state's districting scheme despite evidence that the lines were drawn on the basis of race. According to *Shaw*, the plaintiffs in *UJO* failed to state a valid claim because they "did not allege that the plan, on its face, was so highly irregular that it could be understood only as an effort to segregate

In turning to the facts of this case, we must ask first whether the plaintiffs have carried their burden of showing that the Eleventh District is so "bizarre" or "highly irregular" in shape that it can only be explained by race. In determining whether a district is bizarre, the court may consider many factors, including the district's size, outline, allegiance to traditional districting principles such as compactness and respect for political subdivisions, and how it appears in comparison to other districts in the State's plan, earlier plans, or even districts from other states. Based on objective criteria, I cannot find and cannot conclude that plaintiffs have proved the Eleventh District is bizarre or highly irregular within the meaning of *Shaw*.

1. The size of the district is not particularly noteworthy. Georgia's Districts One, Two, and Eight each have a total area of over 10,100 square miles. In contrast, the Eleventh District has an area of 6,780 square miles.

2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1243 miles) or the Eighth (1155 miles) Districts.

3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire State. But, the Ninth District spans the entire northern border of the State and the First, Second, and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State.

4. The Eleventh District shows considerable respect for existing political boundaries. That seventy-one percent of the district's boundaries follow existing state, county, and city borders is significant. This

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voters by race." *Shaw*, 113 S.Ct. at 2829. Again, appearances count a lot: Is the district highly irregular in its shape?

places the Eleventh at the average for the State's ten other congressional districts.

5. In addition, eighty-three percent of the Eleventh's area comes from whole counties. In comparison, the average among the State's other districts is sixty-two and one-half percent.

6. Georgia's congressional districts have no tradition of being neat, geometric shapes. And, areas of the Second and Eighth Districts in Bibb and Houston Counties look—as irregular or—much more irregular. The same may be said of the Third District in Crawford County. To be sure, the Eleventh makes curious turns in some areas, particularly the areas around Atlanta, Savannah, and Augusta. But, in these areas most of the lines follow existing city boundaries or major highways and roads. The Eleventh District makes use of what some have called "landbridges" to connect populations to the district, but it is not unique in that respect: for example, see the current Seventh District's inclusion of Marietta and the 1970's Seventh District's inclusion of an area in or around Dalton.[4] A comparison of—including, just looking at—Georgia's Eleventh District to the district in *Shaw* or to districts being successfully

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[4] About population, I do not say that population distribution within a district counts for nothing when courts look at the district's appearance for *Shaw* purposes, but I am unsure that the "on its face" rule includes population within the district. In any event, population density normally varies considerably across most districts, except completely urban districts. I expect that many districts (including, for example, Georgia's Ninth District which is, by the way, mostly white) would look funny if geography were somehow distorted—parts blown-up or shrunk—to reflect population density.

challenged in other states supports the conclusion that the Eleventh District is not highly irregular or, put differently, bizarre.[5]

7. That the Eleventh District splits eight counties is unremarkable. The Sixth District has no whole counties but parts of five counties. And, the Fourth District has one whole county and parts of two others. Splitting counties in Georgia's congressional districts for reasons wholly unrelated to race is part of Georgia's history: for example, Whitfield in 1970 and Gwinnett in 1980.

8. Qualitative measurements for compactness, such as perimeter and dispersion measurements, show the Eleventh District is not bizarre or highly irregular.

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[5] In thinking about the degree of irregularity in the shape of the current Eleventh District I have also looked at some proposals for apportionment that were never adopted. Many groups submitted proposals for reapportionment on the basis of one person, one vote. One plan was (and is) known as the "Max-Black" plan or the "Max Plan". The proposal was drawn with one idea in mind: to maximize black representation in Congress and as a corollary to boost black voting power in certain districts in Georgia. The plan shows what the Eleventh District would look like if it was wholly based on race. The Max-Black plan did influence to some degree the shape of the ultimate Eleventh District, a majority black district. But, it seems important to me that the actual Eleventh is *not* identical to the Max-Black plan. The Eleventh, to my eye, is significantly different in shape in many ways. These differences show, as I understand it, consideration of other matters beyond race, including traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons. In the light of *Shaw*, the Max-Black proposal for what became the Eleventh District would likely have been bizarre in shape, but the actual Eleventh District is much more regular. **See Appendix A.**

One measurement, called dispersion scoring, compares the area of the district to the area of the smallest circle that would enclose the district. And, perimeter scoring compares the area of the district to the area of a circle with the same perimeter. While I express no view as to the reliability of these measurements, political scientists, according to plaintiffs' experts, use the measurements to evaluate a district's compactness.

According to perimeter scoring, the Eleventh is more compact than approximately forty-six other congressional district in the county. Under dispersion measurements, the Eleventh is more compact than about twenty-nine other districts. And, under these measurements, the Eleventh is more compact than the North Carolina District challenged in *Shaw*, the Texas and Louisiana Districts recently held unconstitutional in the Fifth Circuit, and the Florida District under challenge in the Eleventh Circuit. Again, these measurements, by themselves, are not outcome determinative; nonetheless, they confirm the view that Georgia's Eleventh District is not highly irregular.[6]

In concluding, I will not be coy: no party in this case disputes that race was an important consideration in the drawing of the Eleventh District. But, as I understand the law as explained by the Supreme Court, the Constitution does not condemn all race-conscious districting. For *Shaw*, appearance is the first and the main issue. Highly irregular appear-

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[6] One of plaintiffs' expert witnesses testified that under these measurements, as well as population compactness measurements, the Eleventh District scored above traditional cut-offs for compactness.

ance must be shown, or federal judges have no right to look further or to inquire more.

Federal courts must be on guard against temptation to venture into the realm of political science. And not every district that some expert or some federal judge could draw "better," that is, more regularly or more compactly, is "highly irregular" within the meaning of *Shaw*. Whatever I may personally think about the wisdom of the Eleventh's boundaries or of the policy choices that led to them, the Eleventh District is not so bizarre on its face to justify, pursuant to the Constitution, a more searching inquiry. Thus, plaintiffs have failed to prove a valid *Shaw* claim. In the absence of such a showing, this court —as I understand the law—cannot rightly interfere with the reapportionment plan that resulted from Georgia's political process.

I would render a judgment for defendants.

"Max Plan"

Current 11th District

APPENDIX B

[Filed July 26, 1994]

STATEMENT OF JUDICIAL NOTICE

Evidence of former discriminatory practices against black people in the State of Georgia need not be presented for purposes of this case. Racial discrimination has been an unfortunate reality in the state's history. No one can deny that state and local governments of Georgia in the past utilized widespread, pervasive practices to segregate the races which had the effect of repressing black citizens, individually and as a group.

In the past in Georgia, like in so many other states of the Union, racial segregation was government policy and a way of life. By law, public schools and public housing were segregated according to race. Public recreational facilities were segregated. Miscegenation was prohibited. Ordinances required segregation in public transportation, restaurants, hotels, restrooms, theaters, and other such facilities, even drinking fountains.

More indirectly, the government often treated black citizens differently from white citizens. Public services were allocated along racial lines. To find roads in white neighborhoods paved but roads in black neighborhoods unpaved was common. In public employment, black workers were often paid less than white workers for the same job. In addition, methods of jury selection were developed to exclude black people from jury service.

Georgia's history on voting rights includes discrimination against black citizens. From the state's first Constitution—which barred blacks from voting alto-

gether—through recent times, the state has employed various means of destroying or diluting black voting strength. For example, literacy tests (enacted as late as 1958) and property requirements were early means of excluding large numbers of blacks from the voting process. Also, white primaries unconstitutionally prevented blacks from voting in primary elections at the state and county level.

Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations. Congressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential. State plans discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts.

Never do we imply that a history of invidious racial discrimination is unique to Georgia. Our judicial notice is confined to Georgia because this case is about Georgia, and Georgia is a covered jurisdiction under the Voting Rights Act. Our notice is intended to set out the historical facts, not to insult a state or people who have made great and difficult strides towards equality during the last thirty years and who could be mentioned for many good, kind, and brave things unrelated to this case.

APPENDIX C

[Filed Sep. 20, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

No. CV 194-008

DAVIDA JOHNSON, ET AL., PLAINTIFFS

v.

ZELL MILLER, ET AL., DEFENDANTS

and

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

and

LUCIOUS ABRAMS, JR., ET AL.,
DEFENDANT-INTERVENORS

UNITED STATES' NOTICE OF APPEAL

The United States hereby gives notice that it will appeal to the United States Supreme Court this Court's September 12, 1994, order granting injunctive relief.

Respectfully submitted,

HARRY D. DIXON, JR.
United States Attorney

DEVAL L. PATRICK
Assistant Attorney General

/s/ Daniel H. Claman
JOHN K. TANNER
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APPENDIX D

[Filed Sep. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

No. CV 194-008

DAVIDA JOHNSON, ET AL., PLAINTIFFS

v.

ZELL MILLER, ET AL., DEFENDANTS

and

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

and

LUCIOUS ABRAMS, JR., ET AL.,
DEFENDANT-INTERVENORS

UNITED STATES' AMENDED NOTICE OF APPEAL

Pursuant to 28 U.S.C. 1253, the United States hereby appeals to the Supreme Court of the United States this Court's September 12, 1994, order granting declaratory and injunctive relief.

Respectfully submitted,

HARRY D. DIXON, JR.
United States Attorney

DEVAL L. PATRICK
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Nos. 94-631, 94-797, 94-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, in his official capacity as Governor, State of Georgia, *et al.*,
Appellants,

versus

DAVIDA JOHNSON, *et al.*,
Appellees,

and

UNITED STATES OF AMERICA AND LUCIOUS ABRAMS, JR., *et al.*,
Appellant-Intervenors.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the District Court's finding of a racial gerrymander is reviewed under the clearly erroneous standard?

II. Whether the decision below presents any substantive departure from the holding of *Shaw v. Reno* which defined the constitutional limits the Fourteenth Amendment places on race based reapportionment legislation?

III. Whether Georgia's admission that racial gerrymandering occurred as a direct consequence of the Justice Department's demand Georgia maximize black voting strength without due regard for traditional districting principles mandates summary affirmance of the decision below?

IV. Whether the absence of any legal obligation under the Voting Rights Act to maximize black voting strength in derogation of Georgia's traditional districting principles pretermits any contention that a compelling interest was furthered by this race based district?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
ARGUMENT	6
I. THE DISTRICT COURT'S CONCLUSION THAT RACIAL GERRYMANDERING RESULTED IN A BIZARRELY CONFIGURED DISTRICT IS REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD	6
II. THE DISTRICT COURT PROPERLY HELD, IN ACCORDANCE WITH *SHAW v. RENO*, THAT GEORGIA'S LEGISLATION CREATING THE ELEVENTH CONGRESSIONAL DISTRICT VIOLATED THE PLAINTIFFS' RIGHT TO EQUAL PROTECTION	8
III. GEORGIA'S UNPRECEDENTED AND EXTREME DEPARTURE FROM ITS TRADITIONAL DISTRICTING PRINCIPLES FOR PURELY RACIAL REASONS IS SUBJECT TO STRICT SCRUTINY	13
IV. COMPLIANCE WITH THE VOTING RIGHTS ACT CAN NOT CONSTITUTE A COMPELLING GOVERNMENTAL INTEREST IN THIS CASE SINCE THE STATE AFFIRMATIVELY DISAVOWED THE VOTING RIGHTS ACT AS ITS RATIONALE FOR THE REDISTRICTING LEGISLATION	15
A. A Congressional District Which Is Bizarrely Configured And Is Overly Safe From The Vantage Point Of Assuring The Election Of A Black Representative, Is Not Narrowly Tailored To Further A Compelling Governmental Interest	16

TABLE OF CONTENTS—Continued

Page

V. GEORGIA DOES NOT HAVE A COMPELLING GOVERNMENTAL INTEREST IN PROPORTIONAL REPRESENTATION OF MINORITIES 18

VI. THE ABRAMS INTERVENORS SHOULD NOT BE PERMITTED TO PARTICIPATE IN ANY PLENARY REVIEW OF THIS CASE 21

CONCLUSION 24

APPENDIX

Population Density Map ..... App. 1

Race Map of Chatham County ..... App. 2

Race Map of Effingham County ..... App. 3

Race Map of Richmond County ..... App. 4

Race Map of DeKalb County ..... App. 5

TABLE OF AUTHORITIES

CASES — Page

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed. 518 (1985)) 7

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989) 19

City of Rome v. United States, 446 U.S. 156, 100 S. Ct. 1548, 64 L.Ed.2d (1980) 6

Gomillion v. Lightfoot, 364 U.S. 339, 80 S. Ct. 669 (1960) 8

Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) 17, 18, 23

Regents of the University of California v. Bakke, 438 U.S. 265 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978) 19

Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362 (1964) 2

Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 73 L.Ed.2d 1012 (1982) 6

Shaw v. Hunt, 1994 WL 457269 (E.D.N.C. August 1, 1994, as amended August 22, 1994 14

Shaw v. Reno, —— U.S. —— 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993) ..... *passim*

Thornburg v. Gingles, 106 S. Ct. 478 U.S. 30, 92 L.Ed.2d 25 (1986) 6, 15, 20

United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 524, 92 L.Ed.2d 746 (1948) .. 7

White v. Regester, 412 U.S., 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973) 6

Wright v. Rockefeller, 376 U.S. 52, 84 S. Ct. 603 (1964) 18

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969) 7

CONSTITUTIONS

U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES

Voting Rights Act of 1965, § 2 and 5 ..... *passim*

RULES

Fed. R. Civ. P. 52(a) 2

Supr. Court Rule 18.6 1

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**On Appeal from a Three Judge Panel
of the United States District Court
for the Southern District of Georgia**

MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the Order and judgment of the three judge panel in this matter. Affirmance is appropriate in light of the State's own candid acknowledgement that it was forced to enact a black vote maximization plan, concocted by the American Civil Liberties Union and imposed on Georgia by the Department of Justice which employed racial gerrymandering as its *modus operandi.*

The issues upon which this case turns are fact intensive. The District Court correctly concluded that the Eleventh

District's shape was highly irregular—bizarre in the parlance of these cases—due to racial gerrymandering. The facts on which this pivotal finding is based are exhaustively cataloged in the majority opinion. Given the deference due those findings by this Court, affirmance is warranted without further argument under *Fed. R. Civ. P.* 52(a).

STATEMENT OF THE CASE

With the completion of the 1990 census, states were obligated to reapportion their Congressional districts to bring them into conformity with the one man-one vote ruling of *Reynolds v. Sims,* 377 U.S. 555 (1964). Prior to the 1990 census, Georgia had ten (10) districts. Its increased population entitled it to one additional seat. (J.S. App. 5)

Since the 1980 census, there had been a quantum leap in the technology of computer software available to assist states in the reapportionment process. Racial data for each census block (100 or less people) became the building blocks employed to fashion districts with a racial rather than geographical focus. (J.S. App. 12, n.6)

This case is ultimately between the State of Georgia and the plaintiff citizens and voters of Georgia who objected to the State's decision to racially gerrymander the boundaries of the Eleventh District. And the State does not dispute any of the salient facts presented by Plaintiffs which the District Court found to be true in connection with the enactment of the reapportionment plan. *Miller, et al.* Jurisdictional Statement [hereinafter *Miller* J.S.] at p. 2. Those facts include the following:

(1) The District Court found Georgia was forced to engage in racial gerrymandering by the Department of Justice [hereinafter referred to as the DOJ] to maximize the Black population in the Eleventh District. Georgia is

a state still under the jurisdiction of the DOJ for purposes of reapportionment. The race based legislation the State adopted was the DOJ's *quid pro quo* for preclearance under Section 5 of the Voting Rights Act [hereinafter, the VRA]. (J.S. App. 26-27) It resulted in a district that was unprecedented in Georgia's history in terms of its shape. The plan surgically segregated every major population center south of Atlanta in order to maximize the inclusion of Blacks and exclusion of whites within the two new majority minority districts the DOJ required the State create.

(2) "The amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming and practically stipulated to by the parties involved." (J.S. App. 42-43). In its jurisdictional statement, the State embraces the District Court's description of the process by which the Eleventh District was created as "a search for [minority voting] maximization by the crudest means, the pursuit of 'maximization of the black vote, whatever the cost', and the like." (*Miller* J.S., p. 3 quoting from the Opinion at App. 27, 11-12, n.4 28).

(3) During the 1990 reapportionment process, the DOJ, in concert with the ACLU, pursued a policy of minority vote maximization throughout the South. (J.S. App. 11). Majority minority districts called "Max-Black" plans were created by the ACLU, ostensibly for their clients, then state legislators Cynthia McKinney and Sanford Bishop. Both were subsequently elected to Congress to represent the very Max-Black districts they worked with the ACLU and DOJ to create. (J.S. App. 13 n.7).

(4) There was no evidence of any intent to discriminate against minorities uncovered at any time during the reapportionment process. (J.S. App. 13). Regardless of that fact, the DOJ adopted the ACLU's Max-Black racial population quotas as the benchmarks for the three majority minority districts the DOJ required Georgia to

create. Those percentages could not be attained without resort to gerrymandering. As stated by the District Court:

> ". . . [T]he slow convergence of size and shape between the Max-Black plan and the plan the DOJ finally precleared, bespeak a direct link between the Max-Black plan formulated by the ACLU and the preclearance requirements imposed by the DOJ." (J.S. App. 26).

(5) The DOJ summarily rejected the first two plans passed by Georgia's legislature. (J.S. App. 13). In the second rejection letter, the DOJ "suggested" the shape the Eleventh District needed to take to meet the 65% black population quota the ACLU had convinced the DOJ was "possible" for the Eleventh even without the Black population in Macon which was needed for the other new Black Max district the DOJ wanted to create. The only way to do that, according to the ACLU, was for the Eleventh, anchored in Atlanta, to find a way to get to *Savannah*. (J.S. App. 15-20) Georgia's Attorney General complained, to no avail, that the proposed configuration of the Eleventh District being advocated by the DOJ/ACLU as violative ". . . of all reasonable standards of compactness and contiguity." (J.S. App. 19) The DOJ was unmoved. Traditional districting principles were then subordinated on a wholesale basis to further the black maximization policies of the DOJ/ACLU by drawing boundaries that specifically included Blacks and excluded whites. Ms. Wilde, the ACLU attorney and acknowledged architect of the gerrymandered District in issue, was not apologetic: "That is how you draw a majority black district." (J.S. App. 20).

(6) The State, acting through its Director of the State Reapportionment office, drew the Eleventh "as close as she could to copying the Max-Black percentages. She was prevented from exact duplication by the need to construct eight other districts . . . ." (J.S. App. 22).[1]

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[1] The DOJ/ACLU team did not even bother with requiring the Max-Black plan to be presented as a state-wide plan. The ACLU

(7) The twin forces that led to the racial gerrymander in issue were the ACLU's advocacy of a black vote maximization policy and the DOJ's misguided reading of the VRA as obligating states to maximize black voting strength wherever possible without regard to the resulting aberrations in the shape and size of the district and the fact states were forced to segregate voters on the basis of their race. This *de facto* delegation of authority by the DOJ to the ACLU was found by the District Court to be an "embarassment." (J.S.App. 26-27).

The dissenting judge adopted a "shape over substance" approach to *Shaw*. In so doing, the dissent would turn a deaf ear and blind eye to the machinations of the ACLU and the DOJ's abuse of its authority under the VRA. The dissent believed the existence of a racial gerrymander turned on the subjective opinion of the fact-finder as to the geometric shape of the District, independent of where the people are concentrated and whether they were intentionally racially segregated by this district's boundaries. With all due respect, the courts cannot hope to offer the kind of continuity we expect of our jurisprudence if the standard is, essentially, a visceral one that will vary from judge to judge and be materially impacted by subjective perceptions that, in the end, are highly personal spatial observations unrelated to any objective standard.

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just drew the Max-Black districts and left the State to work out the rest as best it could.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT RACIAL GERRYMANDERING RESULTED IN A BIZARRELY CONFIGURED DISTRICT IS REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD

This Court has made clear that findings of fact are reviewed under the clearly erroneous standard. This is a strict and longstanding rule. It has been expanded to include ultimate findings in Voting Rights Act cases. *See Thornburg v. Gingles*, 106 S. Ct. 478 U.S. 30, 92 L.Ed.2d 25 (1986).

The standard is especially applicable in these types of cases because of the importance of local factors and geography in assessing whether a gerrymander has infected a districting plan. By analogy, this Court has repeatedly held that the ultimate question of vote dilution under the VRA is a finding subject to review under the clearly erroneous standard:

> ". . . [O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a)." *See, e.g., Rogers v. Lodge*, 458 U.S. at 622-627; *City of Rome v. United States*, 446 U.S. 156, 183, 100 S.Ct. 1548, 1564 . . . (1980); *White v. Regester*, 412 U.S., at 765, 770, 93 S.Ct. at 2339, 2341." *Thornburg v. Gingles*, 106 S.Ct. at 2780.

This same reasoning must apply to the presence of a racial gerrymander because the rationale for the deference —the importance of local factors—is equally applicable in both types of cases. As the Court stated in *White v. Regester*, 412 U.S. at 769-770, 93 S. Ct. at 2341:

> "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

The *Gingles* court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

106 S. Ct. at 2752.

A case of minority vote maximization via racial gerrymandering should be decided under the same standard as a vote dilution case. District courts possess the critical knowledge and experience of the local jurisdiction in issue to make the critical factual determinations on which these cases must turn.

A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 84 L.Ed.2d 518 (1985), (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 68 S. Ct. 524, 92 L.Ed.2d 746 (1948). Furthermore, the Court has emphasized that " '[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' " *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 573, 105 S. Ct. 1511 (1985), (*quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969)).

The District Court brought its considerable local knowledge to bear in this case; that is readily evidenced by its exhaustive opinion. That knowledge is an indispensable ingredient to any sound judgment as to whether this district so materially departed from Georgia's traditional and historical districting principles for racial reasons that it must stand the test of strict scrutiny.

II. THE DISTRICT COURT PROPERLY HELD, IN ACCORDANCE WITH *SHAW v. RENO*, THAT GEORGIA'S LEGISLATION CREATING THE ELEVENTH CONGRESSIONAL DISTRICT VIOLATED THE PLAINTIFFS' RIGHT TO EQUAL PROTECTION

Perhaps it is the simplicity of *Shaw's* teaching that creates the problem for Appellants. The District Court's summary of *Shaw* leaves little to quarrel about as to the standard by which racially gerrymandered districts are to be judged:

> "*Shaw* holds that if a plaintiff shows that racial concerns were the overriding consideration for drafting a redistricting plan, leading to the creation of dramatically irregular district boundaries, that plan is unconstitutional, unless it survives constitutional strict scrutiny." *See Shaw*, 113 S.Ct. at 2826-27.

Contrary to Appellants' view, *Shaw* makes clear that a "highly irregular" boundary line is not the only evidence that would be probative of the existence of a racial gerrymander:

> "The difficulty of proof, of course, does not mean that a racial gerrymander, once established should receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race. Moreover, it seems clear . . . that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so *highly irregular* that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race. [cit.] *Gomillion* [*v. Lightfoot*], 364 U.S. 339, 81 S.Ct. 127 . . . *so, too, would be a case in which a state concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity and respect for political subdivisions.*" (Emphasis added). 113 S.Ct. at 2826.

No one can dispute the fact that the above-emphasized portion from *Shaw* fits the Eleventh District like a glove. While Georgia has persistently contended the gerrymander that formed the framework for this district was fashioned by the ACLU and forced upon it by the DOJ, those facts hardly absolve the State from ultimate responsibility.

Appellees agree that the Eleventh District does not represent a voluntary act of the Georgia legislature. The District Court made voluminous findings in that regard. No party disputes those facts. Appellees acknowledge the State argued mightily against legislatively animating the gerrymandered version of the "Max-Black" plan that is now the Eleventh District, because of its blatant violation of Georgia's traditional districting principles. (J.S. App. 19). The Georgia Attorney General made this written statement to the DOJ before finally acquiescing to their demands:

> ". . . [T]he extension of the 2nd District into Bibb County and the corresponding extension of the 11th District into Chatham County (Savannah), with all the necessary attendant changes, *violate all reasonable standards of compactness and contiguity.*" J.S. App. 19, emphasis added).[2]

Given that statement, it is not surprising the State's proof as to its adherence to traditional districitng principles was virtually nonexistent. It would be an under statement to say that the State's expert witness on compactness, Lisa Handley, was not well received by the Court. In large measure, this was due to the fact the only way the State could generate any argument at all on compactness was to *invent* a compactness test just for this district.[3] The District Court was not fooled:

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[2] It is difficult to understand how the Attorney General could now argue to this Court that the district is compact.

[3] The District Court found that the ". . . test, formulated . . . specifically for this litigation, constituted the State's only notable submission on the subject of compactness." (J.S. App. 78)

> "[T]he . . . test is especially *useless* in analyzing the Eleventh District while the vast—and sparsely populated—core of the Eleventh accounts for the district's favorable score on Dr. Handley's test, the narrow—and densely populated—appendages escape notice. *In fact, this test is an excellent means of highlighting the egregiously manipulated portions of any voting districts.* . . . (J.S.App. 79, emphasis added).

On the issue of compactness, the District Court found:

> "[T]he . . . Eleventh District, from a population based perspective . . ., is not compact for purposes of Section 2 of the VRA. The population of the Eleventh are centered around four discrete widely spread urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors . . . . These communities are so far apart that the DOJ's insistence . . . they are "compact" renders the term meaningless. The hooks, tails and protrusions of those counties reveal the true "shape" of the district. . . ." (J.S. App. 78-79)[4]

Neither the State nor the Intervenors offered any other witnesses on the question of the district's shape. At trial, Plaintiffs offered the population density map attached as Appendix 1 to underscore the truth about this district. It is nothing more than four distant population centers, gerrymandered to make them majority black, stuck together by over 6000 square miles of farmland. Maps reevaling the gerrymander of DeKalb, Chatham, Richmond and Effingham counties are also included in the Appendix so the Court can get a feel for just how cleanly a computer can separate the races. (App. 2-5)[5]

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[4] The District Court also found there was considerable potential for voter confusion due to the fact the ". . . erratic lines and split counties and precincts do not afford voters ready indications of the district in which they reside." (J.S. App. 80, fn. 43)

[5] These are known as race maps, the most common tool used by the DOJ/ACLU to fashion the Eleventh. The orange represents an

The State freely admitted race drove the district's creation and that the ACLU's Max-Black plan was the DOJ's litmus test for the district's racial population percentages. Given those admissions, the district had no hope of surviving strict scrutiny. So, the State opted for an "all or nothing" defense by arguing first, that the admitted racial gerrymandering was accomplished without having to draw boundaries that were as bizarre as what was done in other Southern states. Second, the State contended the district was not bizarre because its boundaries track bits and pieces of state, county, city, precinct and highway lines. These arguments, if accepted, would allow wholesale racial gerrymandering to escape constitutional review.

The District Court made short work of these arguments. It recognized that the way racial gerrymandering is accomplished at the Congressional level is to contort distant densely populated urban areas into super majority black population centers and then connect them. The urban cities/counties divided for racial purposes must, by definition, be located on the peripheries of the gerrymandered district. (J.S. App. 22) This is the only way to segregate a political subdivision's population racially. Thus, myriad chards of the circumferences of these divided cities and counties always become conterminous with district boundaries. This is the very evidence from which gerrymandering is proven.

The State, however, tried to turn this geographical truism to their advantage. In its view, bits and pieces of divided city, county lines that blend with the districts boundaries because of the gerrymandering taking place could be considered evidence of *regularity*. Incredibly, the tables the State hinges its case on are intended to quantify just such a contention. (Tables 1-2, *Miller*, J.S., p. 7-8).

Absurd results would follow if the consequences of racial gerrymandering were accepted as indicia of regu-

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area that is over 50% Black; yellow is over 60% Black, and blue is 35-49% Black. Grey is less than 35% Black. See Plaintiff's trial exhibits 11; 18-20.

larity. Just two examples should suffice. The State contends adherence here and there to State boundaries is evidence of a district's regularity regardless of the location of the population centers. A review of the unconstitutional Fourth District in Louisiana points out the fallacy of such a contention. Almost half its boundary is coterminous with the State's northern boundary. *See Miller's* J.S., App. 109. The district itself, however, hangs from that border like long icicles off a roof, fingers that grope for and grab pockets of Blacks, but thin out and elongate to skirt contiguous population centers that are predominantly white. The State would argue that the Court should not even inquire as to the reasons for the formation of the "icicles", given the regularity of the roof line.

For a second example, consider the thin land bridge that runs through Effingham and Chatham County to reach the black neighborhoods of Savannah. (App. 3-4) Its purpose was to get Black people in Savannah into the Eleventh while maintaining technical contiguity with the rest of the district. This land bridge has, as its eastern border, the state line of Georgia and its coast. It has such a boundary, not because of any desire to follow a state line, but to avoid the predominantly white population in Effingham County by running the district to Savannah partially through a swamp. (J.S. App. 42-43) Should this racial motive be immune from strict scrutiny merely *because* a state line that runs through a swamp came into play?[6] If ever an argument could be said to put form over substance, the Appellants have done it.

The District Court correctly refused to ignore the *reason* for the unprecedented division of cities and coun-

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[6] Likewise, pieces of the boundaries of DeKalb, Richmond, Chatham, Wilkes and Baldwin counties that matched the ultimate boundaries of the Eleventh are touted by the State as proof of the district's regularity while, in the same sentence, it freely admits these counties were torn apart solely to further the segregationist motives of the district architects.

ties required to create the DOJ mandated majority minority districts.[7] The majority firmly grasped the fact that the mechanistic interpretation of *Shaw* urged by the State would create a gaping loophole in the fabric of our Constitution through which all fashions of admitted racial gerrymanders would escape strict scrutiny. It did not permit this attempted end run around the Equal Protection Clause.

III. GEORGIA'S UNPRECEDENTED AND EXTREME DEPARTURE FROM ITS TRADITIONAL DISTRICTING PRINCIPLES FOR PURELY RACIAL REASONS IS SUBJECT TO STRICT SCRUTINY

There is nothing new about this Court's view that the Fourteenth Amendment requires strict scrutiny of legislation that incorporates racial classifications. The State's "shape only" argument is borne of the fact it cannot allow an analysis under the strict scrutiny test due to its acknowledgement that the District is based on a "black max" plan—the converse of the "narrow tailoring" required for the use of racial classifications in legislation. The District Court made short work of the State's contention that shape, and shape alone, must be the evidence from which a finding of gerrymandering is based:

> "Defendants argued . . . that evidence of the legislature's intent to gerrymander must be inferred from the shape of the . . . District itself, and not from direct testimony of those involved in the process. This view finds little support in *Shaw v. Reno*. The purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards. If the district appears uninfluenced by accepted districting principles . . . it must have been influenced

[7] The District Court also rejected the State's contention that adherence in some spots (the gerrymandered areas) to precinct lines was evidence of regularity. The State's own Director of Reapportionment Services testified that the use of such lines as racially motivated. (J.S. App. 46)

> by unaccepted ones. The Supreme Court explicitly approved this inferential approach because legislative intent is notoriously difficult—if not logically impossible—to ascertain . . . . *What the Supreme Court did not do in imbue geography with constitutional significance*; the requirement for a successful Equal Protection claim is still *intent*, however proved. Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation is not what *Shaw* intended. [Defendants'] approach would make district shape a (previously unheard of) threshold to constitutional claims." (J.S. App. 42, emphasis added).

In taking up the State's banner, the dissent has chosen a path no subsequent court could hope to follow. There can be no universal standard by which shape, and shape alone, can govern the ability of citizens to seek relief from the disenfranchising and discriminatory effects of a racial gerrymander. Each case is unique to the locale where it arose. No one would ever suggest for a minute that *Black* voters would be so limited that motive and intent could be ignored in determining whether a gerrymander existed. That is racism in its purest form and has no place in the *equal protection* jurisprudence of this Court.

Of all the three judge courts that have dealt with issue of racial gerrymandering and construed the standards established in *Shaw v. Reno* for constitutional review of an alleged gerrymander, no court has agreed with the State's position. Even in *Shaw v. Hunt*, where the District Court rejected the Plaintiffs' claims in a 2-1 decision, the majority refused to adopt such an extremely narrow view of *Shaw*. Once that contention is rejected, the State has no further defenses to offer.

Lest we lose right of it in the smoke and fire of the racial politics that drove the creation of this district, it is important to remember that the primary purposes of reapportionment is to equalize the voting districts' popula-

tion so to comply with the constitutional mandate of one man-one vote. Each state has its own districting traditions, its own history of reapportionment. When those districting traditions are ignored, when districts are drawn that twist and turn due solely to the need to meet racial percentages, the district must stand the test of scrutiny. That is the only way to insure white voters are not either being discriminated against, or, if they are, to insure the State is furthering a compelling state interest in a manner narrowly tailored to further that interest.

IV. COMPLIANCE WITH THE VOTING RIGHTS ACT CAN NOT CONSTITUTE A COMPELLING GOVERNMENTAL INTEREST IN THIS CASE SINCE THE STATE AFFIRMATIVELY DISAVOWED THE VOTING RIGHTS ACT AS ITS RATIONALE FOR THE REDISTRICTING LEGISLATION

Unlike the other Southern states defending DOJ mandated gerrymanders, Georgia did not (because it could not) argue compliance with the Voting Rights Act as a compelling state interest to justify this district. It was wise not to. No court would ever hold the failure to combine the distant urban centers, skeletonized of their white citizenry by the computer driven gerrymandering techniques of the ACLU, would violate Section 2 of the VRA. The DOJ could never have met the test for vote dilution laid down by this Court in *Gingles, supra.* The District Court so found. (J.S. App. 78-80)

It is not surprising then that the DOJ urged this Court to great plenary review in the Louisiana case [8] and hold the case at bar. In its jurisdictional statement, the DOJ carefully skirted the huge problem created by Georgia's recognition that compliance with the Voting Rights Act cannot serve as a compelling state interest to justify the race based districting that took form as the Eleventh Dis-

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[8] *United States v. Hayes,* Docket No. 94-558.

trict. Note the language the DOJ chose to describe the dilemma:

> "The first question in both [*Hayes* and this case] would be whether the State's asserted interests in drawing an additional majority minority district were sufficiently compelling . . . . In both cases, the primary interests that *could be asserted* were the need to comply with Section 2 and . . . Section 5 of the Voting Rights Act . . . (p. 16, emphasis added).

The key words are *"could be asserted."* In this case, it was not so asserted.

Georgia has gone to great lengths to disavow any correlation between the State's acquiescence on the preclearance demands of the DOJ and any perception on the part of Georgia that the failure to draw such a gerrymandered district would violate either Section 2 or 5 of the Voting Rights Act. Georgia had this to say about its preclearance experience and what the DOJ believed the Act required of a state:

> ". . . [I]n [the DOJ's] view . . . *anything* can be done in the name of minority voting opportunities. . . . [I]n the intervenors' view . . . 'race trumps all else'." (*Miller*, J.S., p. 15).

A. A Congressional District Which Is Bizarrely Configured And Is Overly Safe From The Vantage Point Of Assuring The Election Of A Black Representative, Is Not Narrowly Tailored To Further A Compelling Governmental Interest

Georgia affirmatively opposed the DOJ's contention that the district's gerrymandered boundaries were compelled by the VRA to remedy racially polarized voting. And Georgia also demonstrated, via expert testimony, that even assuming a compelling state interest existed in the VRA, the district was far from being narrowly tailored. Georgia stood firmly with the plaintiffs on that issue at

trial and the District Court agreed. (J.S. App. at pp. 86-87.)[9] Based on testimony offered by the State's expert witness, the Court found that Black candidates would have ". . . an equal chance of being elected in a district containing 45-50% black registered voters." (J.S. App. p. 88) The Eleventh District is overly safe with 57% Black registered voters which gives the Black candidate a 73% probability of winning. Obviously, an assessment using the district's Black voting age population (61%), the standard used by this Court in *Johnson v. DeGrandy*, 114 S. Ct. 2752 (1994), ". . . would yield an even higher probability." J.S. App. 88).

The District Court therefore had little problem finding that, even assuming the VRA provided a compelling state interest to engage in remedial districting, the district was not narrowly tailored. Georgia thus found itself vindicated on the one hand, but devoid of any constitutional basis upon which to justify the race based districting that resulted from Georgia's acquiescence to the DOJ/ACLU ultimatum to "maximize" Black voting strength, regardless of the bizarre shape of the resulting district, or be denied clearance under the VRA.

The consequences of the DOJ's Section 5 review of the Georgia Congressional plan, if left to stand, would have cataclysmic effects on the democratic form of government we are guaranteed by our Constitution. In the Eleventh District, regional representation has been supplanted by racial representation. To tinker with such a fundamental aspect of our democracy would be unthinkable but for the fact its proponents advance their claim under the banner of "equal opportunity". The road to a color blind society is surely not followed by method-

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[9] The District Court correctly observed that ". . . the State . . . retained Dr. Katz for the unusual purpose of undermining the testimony of both Intervenor United States' expert . . . and Plaintiffs' expert. He was largely successful." (J.S. App. 86)

ical segregation of the races into separate voting districts. The Constitution must remain unsullied in its pristine guarantee of equal protection if we are not to regress into a country of racial and ethnic enclaves. This Court has made this point time and time again. *See e.g., Wright v. Rockefeller,* 376 U.S. 52, 53-58, 84 S. Ct. 603 (1964). The District Court correctly implemented that message in this case. (J.S. App. 32, n.17)

V. GEORGIA CANNOT HAVE A COMPELLING GOVERNMENTAL INTEREST IN PROPORTIONAL REPRESENTATION OF MINORITIES

This case was foreshadowed in Justice Kennedy's concurring opinion last term in *Johnson v. DeGrandy,* 114 S. Ct. 2647, 2666 (1994).

> "Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid Section 2 litigation. . . . The Department of Justice might require (in effect) the same as a condition to granting preclearance under Section 5 of the Act. . . . *Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause its set against.* [cit.] As a general matter, the sorting of persons with any interest to divide by reason of race presents the most serious constitutional questions." Opinion at pp. 20-22.

Justice Kennedy's fears became reality in Georgia.

After the *DeGrandy* decision was handed down, the State announced that its alleged interest in "proportionality" would, standing alone, satisfy the troublesome need for a compelling state interest. (J.S. App. 51) This novel contention, borne of a most tortured reading of the Court's *DeGrandy* opinion, was juxtaposed against the

explicit disavowel in the VRA of any requirement of proportional representation and summarily dismissed by the District Court. (J.S. App. 53-54)

The State argues that the end (rough proportionality) somehow justifies the means (segregation via gerrymander). The District Court characterized the State's argument as tautological, holding proportionality standing alone, can never be a compelling state interest. (J.S. App. 53) To require proportionality is to sanction racial quotas. The constitution forbids it, and the Voting Rights Act specifically disavows it. To accept the State's claim that proportionality, in these circumstances, does not function as a racial quota, would require this Court to ignore the overwhelming and largely undisputed evidence to the contrary detailed in the District Court's opinion regarding the origins of the Georgia plan. To evaluate proportionality to such a level would require reversal of a long line of precedent that prohibits employment of racial quotas by governments, from admissions policies for professional schools, to public sector affirmative action plans and the awarding of public contracts. *See e.g., City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

The evidence was overwhelming on the issue. The Eleventh District's boundaries were drawn specifically to maximize the number of minority controlled districts and to meet "Black-Max" racial population quotas. Not even Appellants contend that the district's bizarre shape was an incidental and natural development during reapportionment. The number of majority minority districts in the plan suddenly became proportionate to the percentage of black people living in the State only because the DOJ decreed it be so over the State's strident objection. The State's eleventh hour attempt to reply on proportionality

is an attempted revision borne out of advocacy rather than history.

If there were sufficiently large, concentrated and compact minority populations capable of supporting the creation of three minority controlled districts, Section 2 of the VRA would have provided the mandate for their creation. See *Gingles, supra.* That was not the case here, the District Court finding ". . . the district does not satisfy the *Gingles* preconditions . . .". J.S. App. 88) Were it otherwise, there would be no need for any discussion of proportionality in the context of what compelling state interest could justify the race based districting under challenge. The State correctly conceded it did not possess the kinds of contiguous and concentrated minority populations sufficient to justify, or even mandate, the creation of three minority districts under the *Gingles* standard. With this concession, the VRA falls away as substantiation for the blatant dominance of race as the creative force behind the Eleventh District.

The State acknowledged there is no legal obligation or authority under the VRA to excise the black people out of DeKalb County and link them by various land bridges to distant black populations excised out of coastal Savannah. In fact, the State stipulated Savannah would *not* have been included in the District *but for* the need to increase the Black population of the District. (J.S. App. 48-49)[10] The ideal of proportionality can never justify a State's creation of voting districts based on race with quota like black population percentages imposed by the DOJ/ACLU. This Court must leave this social debate without arming proponents of proportionality with con-

---

[10] Incredibly, the line drawing in Chatham County (Savannah) excised a 80,000 plus population for inclusion in the Eleventh that was 84% Black from a general population that was 62% white. See Race Map of Chatham County at App. 2.

stitutional authority to gerrymander. Given the standard of review applicable to this case, this Court must accept the District Court's findings on this issue and affirm the decision below.

VI. THE ABRAMS INTERVENORS SHOULD NOT BE PERMITTED TO PARTICIPATE IN ANY PLENARY REVIEW OF THIS CASE

From the onset, this litigation has been slowed and unduly complicated by the presence of the Intervenors.[11] That sentiment is borne out by a review of the ACLU's jurisdictional statement. Their contentions at trial and on appeal are wholly duplicative of the DOJs position. The ACLU intervenors present no credible arguments or contentions not adequately advanced either by Georgia or the Justice Department.[12] Should this Court not summarily affirm the judgment below, they are not a necessary party to any plenary review of this case. For this reason, the six (6) issues they urge the Court to consider are dealt with summarily below:

1. *Plaintiff's lack of standing*: The three judge Court characterized the lack of standing argument as *frivolous*. (Order of June 14, 1994). *Shaw* specifically states that nothing in the law precludes "white voters (or voters of any race) from bringing a . . . claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." 113 S. Ct. at 2824, 2830. No Court has

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[11] During the trial of this case, the Court expressed constant displeasure over the role Intervenors sought to play in the presentation of the evidence. The Court's frustration reached the point where Judge Edenfield observed that, in retrospect, granting the Intervenors party status was a mistake.

[12] All DOJ/ACLU evidence at trial was presented jointly. The ACLU offered no independent expert testimony.

since questioned *Shaw*'s holding that voters having standing to challenge racially gerrymandered districts. The argument is not worthy of further discussion; perhaps that is why the ACLU Intervenors only offered two sentences on the subject.

2. *The District is not bizarre*: The Court below found the district's boundaries to be bizarre as that term is defined in *Shaw*. The standard of review of such fact finding makes it unworthy of plenary review. The ACLU intervenors offered *no* independent evidence as to the appearance of the district. Instead, they focused their presentation on the proposition, which no court has accepted to date, that being Black, in and of itself, creates a racial community of interest that transcends geography and legitimizes majority minority districts, no matter how bizarre their shape. Again, the argument is not a serious one given the Court's holding in *Shaw*.

3. *Racial Community of Interest As Compelling State Interest*: As noted above, the question is not substantial. The racial community of interest argument advanced by these intervenors would effectively overrule *Shaw*. The consolidation of Black voters into their own districts so to maximize their voting strength, regardless of the geographic aberrations required to bring together a "racial" community of interest, is the political apartheid *Shaw* speaks so eloquently against. In the search for an integrated color blind society, the ACLU intervenors advocate resurrection of racial enclaves that, at least politically,, will resegregate society. That is precisely what *Shaw* was intended to prevent.

4-5. *Voting Rights as a Compelling State Interest*: Throughout the case, the State has refused to raise the VRA as a compelling state interest to justify the bizarre geography of the Eleventh District. The State put on expert testimony, accepted by the Court, rebutting Intervenors' joint efforts to paint Georgia as suffering from rampant racially polarized voting that mandated con-

struction of a remedial district. Intervenors' frustration with the State's rejection of this defense has found a voice in their decision to vicariously advance compliance with the VRA as the State's motive for the district's configuration. The missing link in the logic is, of course, the State's refusal to participate in the plan and the incurable antagonism between the maximization goals that the district was based on and the narrow tailoring required under strict scrutiny. The Intervenors are left with the State's *post hoc* rationalization, borne of its misreading of the *DeGrandy* decision, that proportionality was its "true motive". However, this is not simply a compelling state interest sufficient to withstand strict scrutiny under the Equal Protection Clause. With that recognition, the equal protection analysis is at an end.

6. *Narrow Tailoring*: The issue is mooted from the State's vantage point due: (1) to the absence of a compelling state interest; and (2) the expert testimony it offered to rebut the Intervenors' claim that the 65% Black population was needed to give minority candidates an equal opportunity. Intervenors are hard pressed to contend with any credibility that a plan known as the "Black Max" is "narrowly tailored". The District Court meticulously traced the interrelationship between the advocacy of the ACLU, the positions taken by the DOJ during the preclearance process of the fact the ACLU's Black-Max plan became the blueprint for what is, for now, the Eleventh District. Maximization is the antithesis of narrow tailoring. The ACLU is "hoisted on its own pitard" with respect to this aspect of the strict scrutiny test.

CONCLUSION

This case presents a scenario that is an anathema to a constitutional democracy. The will of the people, as expressed by their elected representatives, was subverted in ruthless fashion. And this subversion was accomplished by no less a force than the United States Department of Justice, whose conduct the District Court characterized as nothing less than an "embarrassment." (J.S. App. 27)

Democracy is a system of government that depends on an intricate scheme of checks and balances for its viability. The genius of our democracy is that there is a check to correct every wrong—even when it is visited upon the people by the federal agency charged with enforcement of our constitution and laws. The trial court performed that function thoroughly and courageously.

This Court has repeatedly acknowledged the extreme deference due local tribunals in matters of this nature. It should not stray from that precedent, particularly where it is not presented with a single issue of first impression by this case due, in large measure, to the State's admissions and its refusal to rely upon the Voting Rights Act as justification for the gerrymander. Instead, Georgia has offered the weak pop fly of proportionality as its reason for deployment of a racial gerrymander. That is not an argument worthy of serious consideration.

Racial gerrymanders that torture our most fundamental right—to vote in elections free of governmental intervention on the side of any candidate or any class of candidates—are generally not welcome in a democracy. Given the well supported and largely stipulated findings upon which the District Court decision is based, coupled with the deference they are due, summary affirmance is warranted.

Respectfully submitted,

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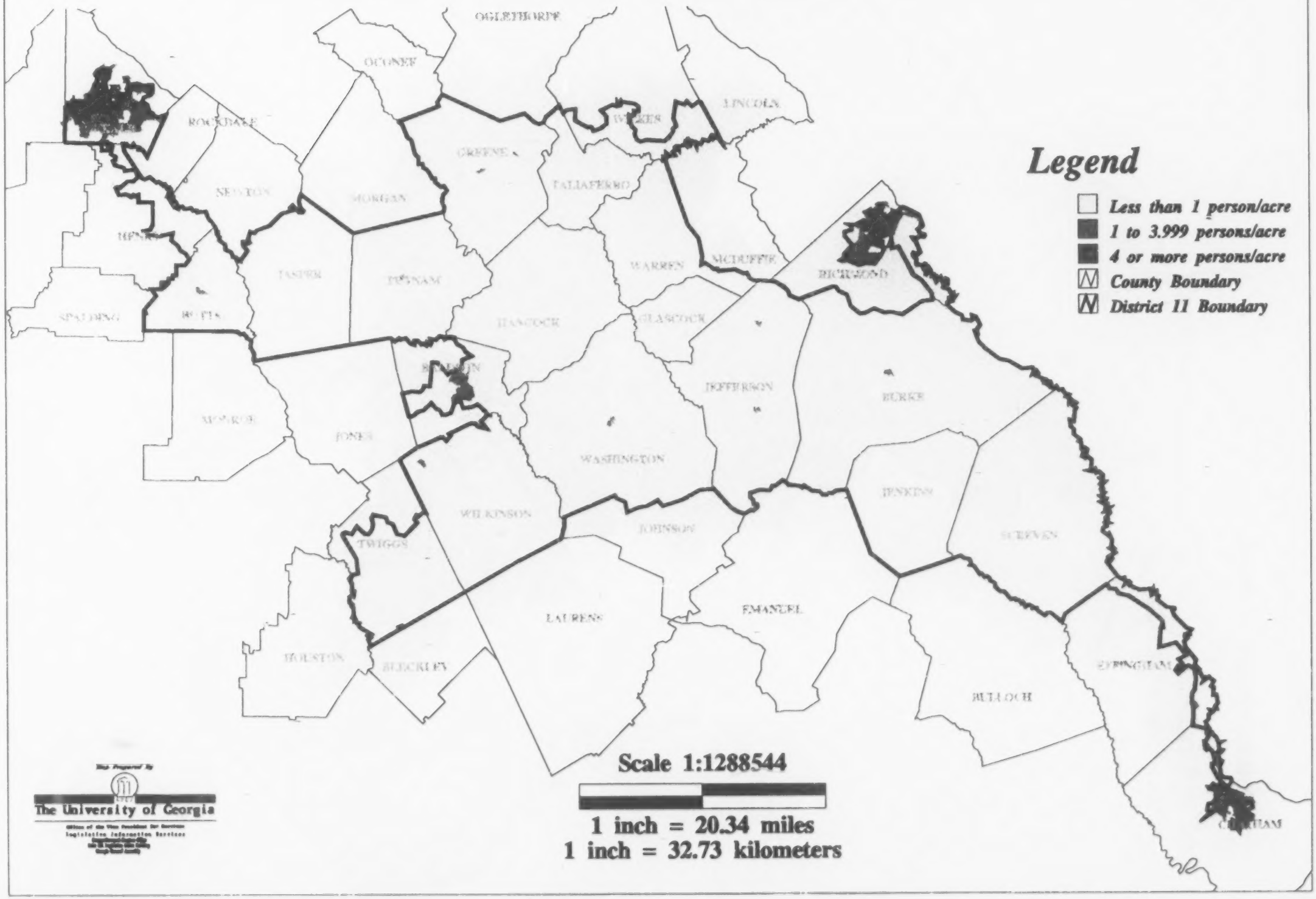
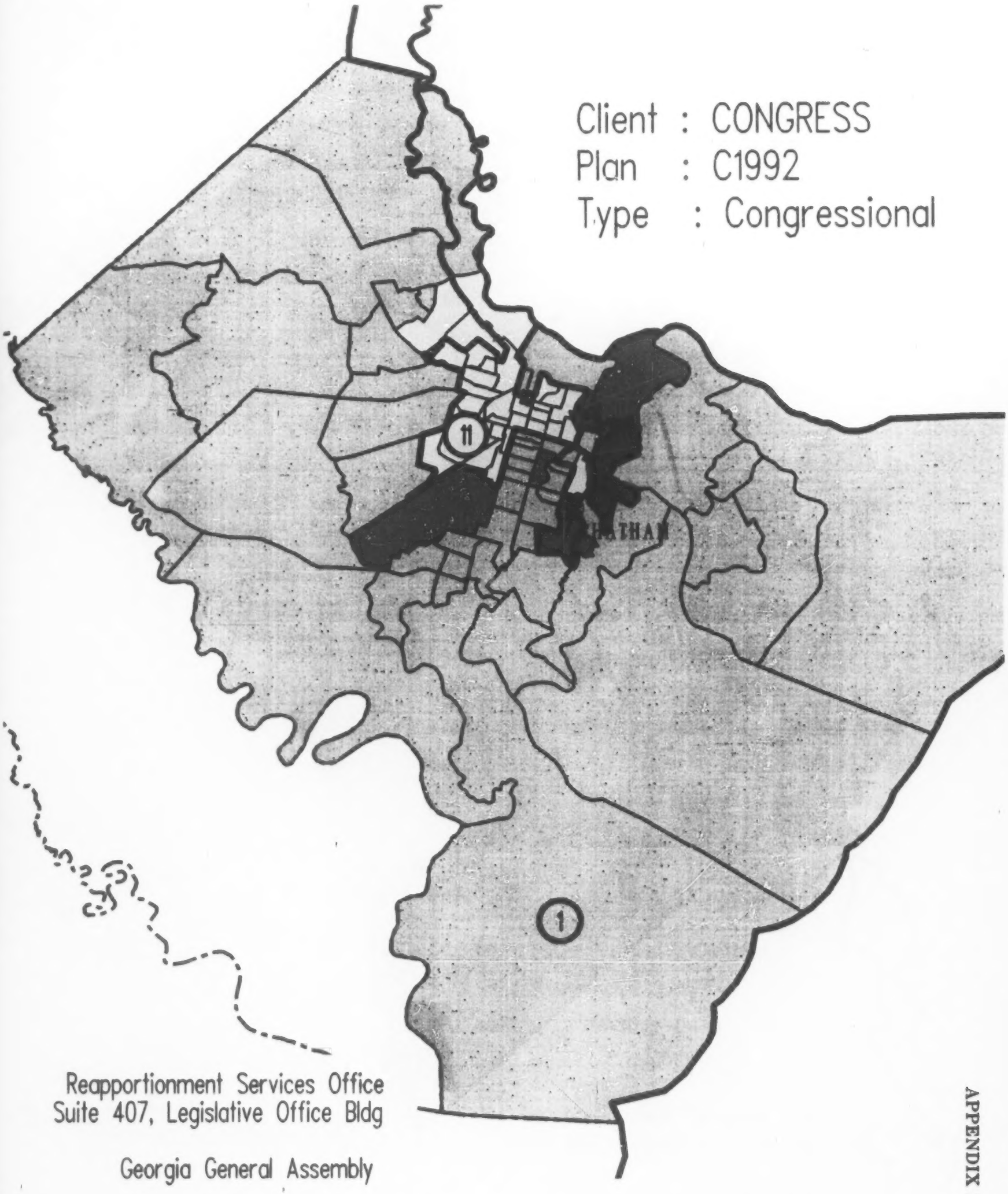
December, 1994

Persons per Acre by Census Block Group



Map Prepared by
The University of Georgia
Office of the Vice President for Services
Legislative Information Services



Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

APPENDIX 2

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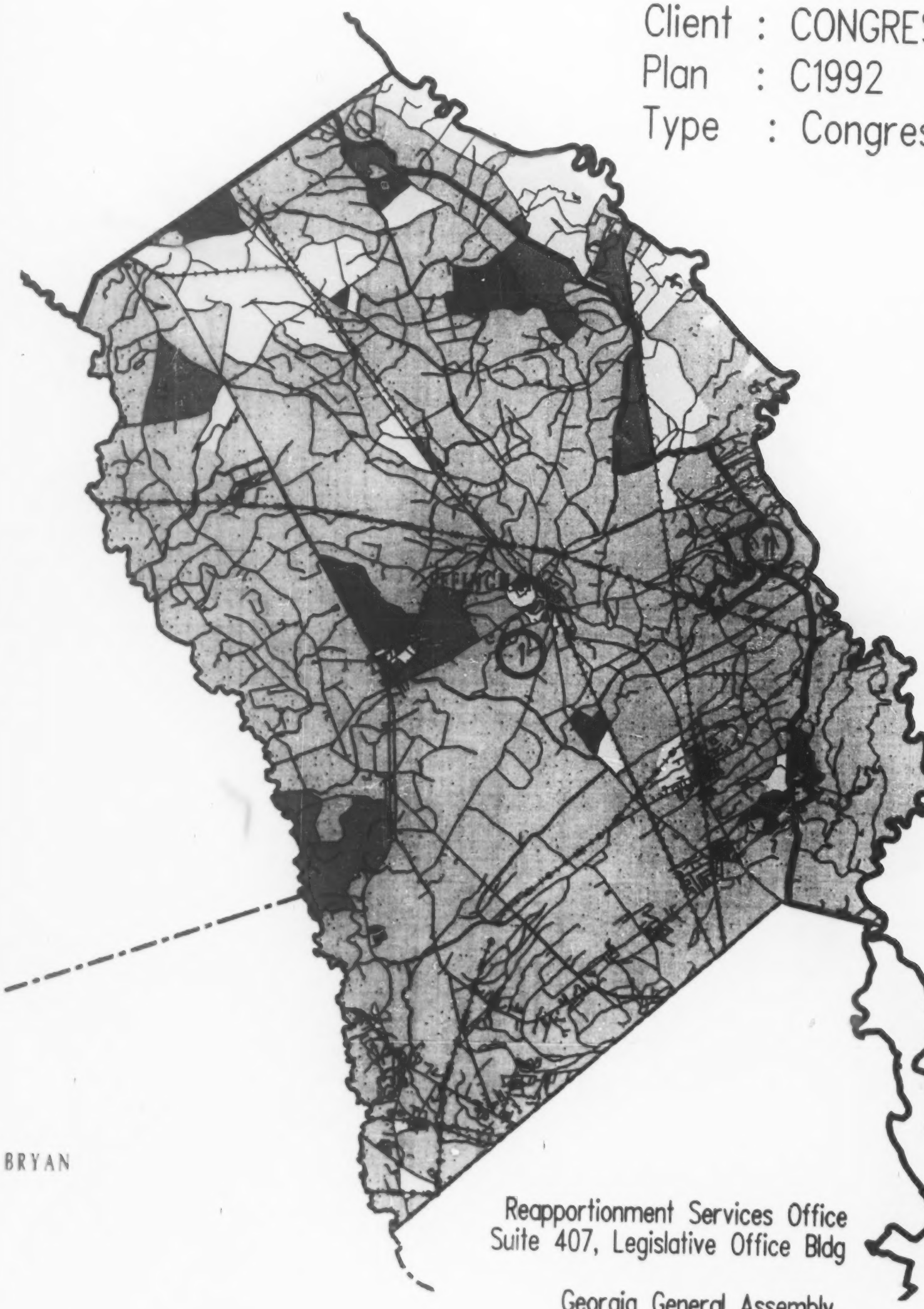
Plan : C1992
Type : Congressional



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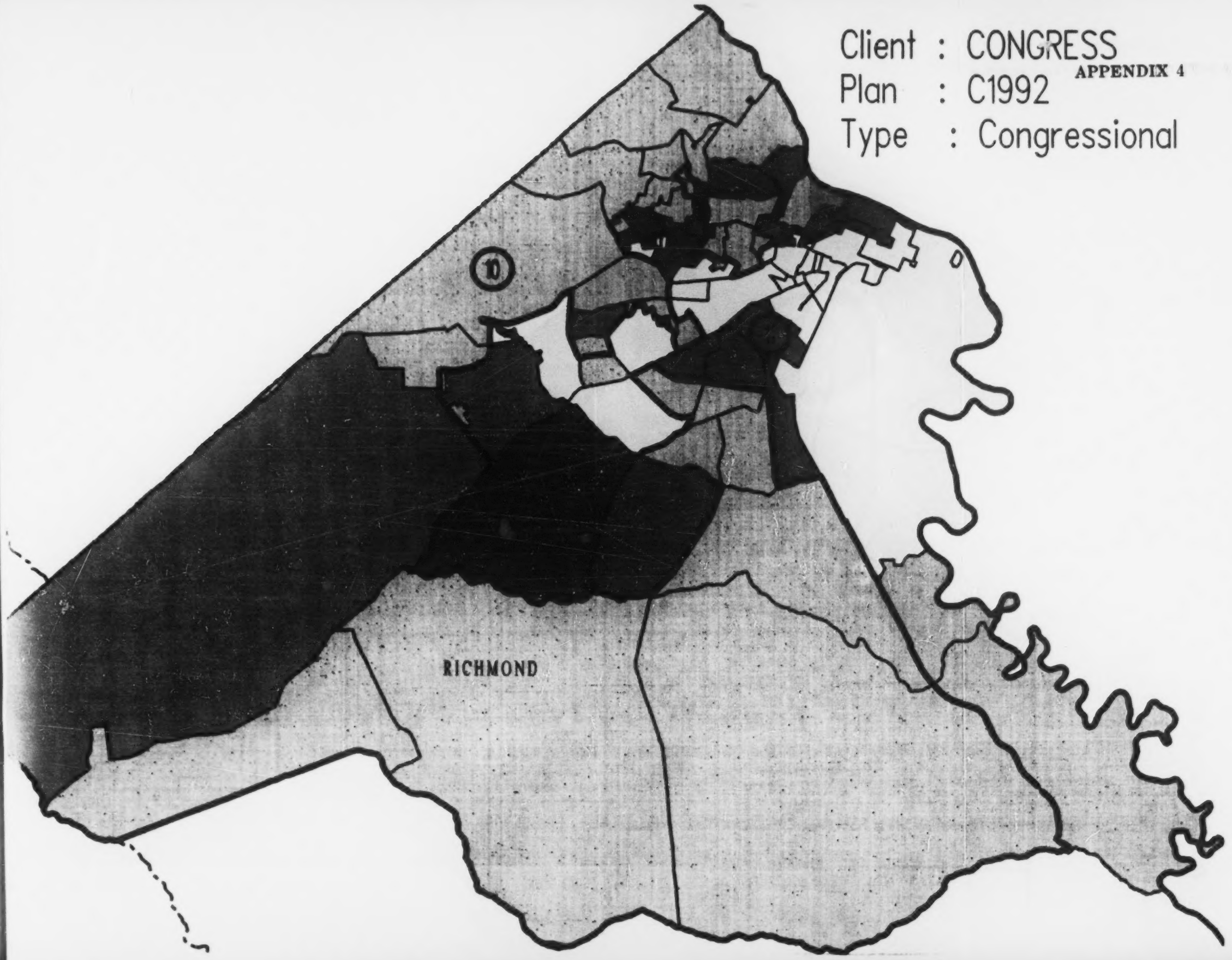
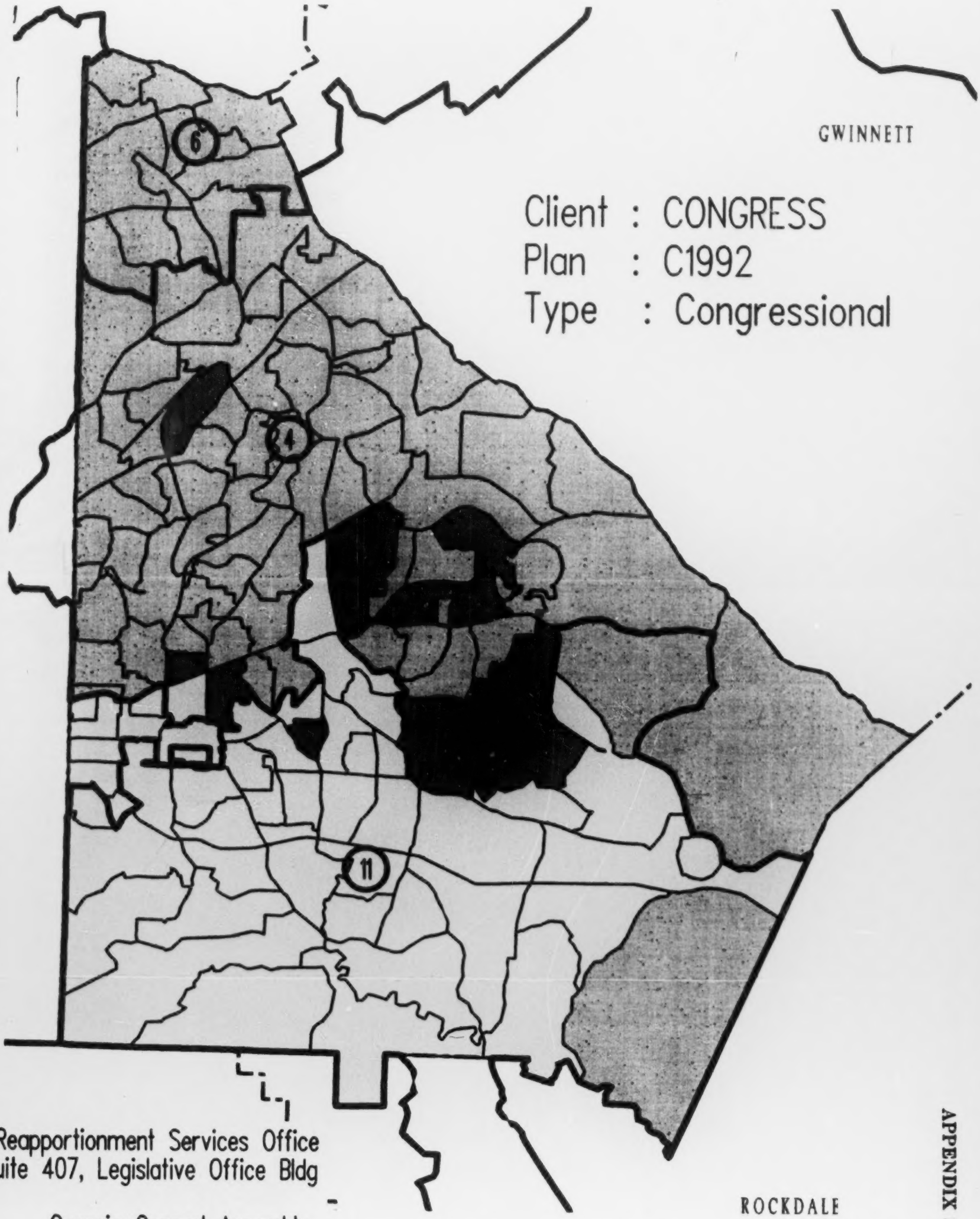
Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

APPENDIX 3

Client : CONGRESS
Plan : C1992
Type : Congressional





Client : CONGRESS
Plan : C1992
Type : Congressional

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Suite 407, Legislative Office Bldg

Georgia General Assembly

APPENDIX 5

Nos. 94-631, 94-797 and 94-929

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ZELL MILLER, ET AL., *Appellants*
vs.
DAVIDA JOHNSON, ET AL., *Appellees*

LUCIOUS ABRAMS, JR., ET AL., *Appellants*
vs.
DAVIDA JOHNSON, ET AL., *Appellees*

UNITED STATES OF AMERICA, *Appellant*
vs.
DAVIDA JOHNSON, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District Of Georgia

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TABLE OF CONTENTS

Page

Relevant docket entries in the United States District Court for the Southern District of Georgia, Augusta Division 1

SUBSTITUTE JOINT SUBMISSION of the Parties (excerpts) 9

ORDER granting in part and denying in part Plaintiffs' Motion to Compel Discovery from Defendant Intervenor United States, inter alia 34

ORDERS noting probable jurisdiction and consolidating appeals 49

JOINT EXHIBITS OF ALL PARTIES:

No. 1 – Map and Demographic Chart of Georgia Congressional Districts 1992 51

No. 2 – Map and Demographic Chart of Proposed Congressional Redistricting Plan SB705CONF1 ... 54

No. 3 – Map and Demographic Chart of Proposed Congressional Redistricting Plan SB2EXASPASS .. 57

No. 4 – Map and Demographic Chart of Proposed Congressional Districts 2, 5 and 11 designated BMCCONGRESS 60

No. 8 – Map and Demographic Chart for Proposed Congressional Redistricting Plan designated SREDRAW2 62

No. 9 – Georgia House Reapportionment Guidelines 65

No. 10 – Georgia Senate Reapportionment Guidelines 72

TABLE OF CONTENTS – Continued

Page

No. 12 – Map of Georgia Congressional Districts 1965-1971 78

No. 14 – Map of Georgia Congressional Districts 1972-1980 79

No. 15 – Map of Georgia Congressional Districts 1982-1990 80

No. 16 – Map of Georgia Congressional Districts 1933-1965 81

DEFENDANTS' JOINT EXHIBIT:

No. 11 – Map of Proposed Georgia Congressional Districts Designated TEMPLATE 82

STATE OF GEORGIA (Appellants Miller, Howard & Cleland) EXHIBITS:

No. 83 – Municipal Boundary Map of Dalton, Georgia 84

No. 87 – Municipal Boundary Map of Gainesville, Georgia 85

No. 92 – Municipal Boundary Map of Marietta, Georgia 86

No. 93 – Municipal Boundary Map of Milledgeville, Georgia 87

No. 95 – Municipal Boundary Map of Rome, Georgia 88

No. 100 – Municipal Boundary Map of Valdosta, Georgia 89

No. 157 – Population Density Map of Georgia Eleventh Congressional District 90

TABLE OF CONTENTS – Continued

Page

No. 158 – Population Density Map of Georgia First Congressional District 91

No. 159 – Population Density Map of Georgia Second Congressional District 92

No. 160 – Population Density Map of Georgia Third Congressional District 93

No. 164 – Population Density Map of Georgia Seventh Congressional District 94

No. 165 – Population Density Map of Georgia Eighth Congressional District 95

No. 166 – Population Density Map of Georgia Ninth Congressional District 96

No. 167 – Population Density Map of Georgia Tenth Congressional District 97

UNITED STATES' EXHIBITS:

No. 76 – Plans approved by Georgia House and Senate 98

PLAINTIFFS' EXHIBITS:

No. 2 – Letter dated January 21, 1992 from United States Department of Justice to State of Georgia objecting to first congressional redistricting plan 99

No. 3A – Letter dated March 3, 1992 from State of Georgia to United States Department of Justice submitting second congressional redistricting plan 108

TABLE OF CONTENTS – Continued

Page

No. 4 – Letter dated March 20, 1992 from United States Department of Justice to State of Georgia objecting to second congressional redistricting plan 120

No. 16A – Table: Split Precincts in 1992 Georgia Congressional Redistricting 127

No. 16B – Table: History of Split Municipalities in Georgia Congressional Redistricting 128

No. 17 – Race Map of Georgia 130

No. 24 – Charts reflecting population distribution and land mass (2 tables) 131

No. 25 – Graphic Depiction of Population Density ... 133

No. 29 – Map of Georgia Second Congressional District 134

No. 29A – Chart reflecting population distribution, land mass, split counties and municipalities in Second District 135

No. 32 – Map of Houston/Peach County area within the Second Congressional District 137

No. 38 – Race Map of Houston/Peach County area within the Second Congressional District 138

The following opinions, decisions, laws and exhibits have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement of Appellants Miller, et al. (No. 94-631):

Opinion of the District Court in *Johnson v. Miller* Civil Action No. 194-008 (S.D. Ga. 1994) ..... App. 1

TABLE OF CONTENTS – Continued

Page

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 .....App. 103

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) .....App. 103

Map of Georgia's Eleventh Congressional District .....App. 106

Map of North Carolina's Twelfth Congressional District.....App. 107

Map of Florida's Third Congressional District....App. 108

Map of Louisiana's Fourth Congressional District .....App. 109

The following opinions, decisions, orders, laws and exhibits have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement of Appellants Abrams, et al. (No. 94-797):

Order denying Motion to Dismiss for Lack of Standing .....App. 103

Fourteenth Amendment of the Constitution of the United States, Equal Protection Clause.....App. 115

Statement of Judicial Notice of the District Court in *Johnson, et al. v. Miller, et al.*, 194-008 (S.D. GA 1994).....App. 119

The following exhibits have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the printed Motion to Affirm of Appellees:

Map of Population Demographics.....App. 1

TABLE OF CONTENTS – Continued

Page

Map of Portions of Chatham County, Georgia . . . App. 2

Map of Portions of Effingham County, Georgia . . App. 3

Map of Portions of Richmond County, Georgia . . App. 4

Map of Portions of DeKalb County, Georgia . . . . . App. 5

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

JOHNSON, et al.

Plaintiffs,

v.

MILLER, et al.

Defendants,

and

UNITED STATES OF AMERICA and
LUCIOUS ABRAMS, JR., et al.

Intervenor Defendants.

FILED: January 13, 1994

CIVIL DOCKET FOR CASE NO. 94-CV-8 [194-008]

* * *

1/13/94	1	COMPLAINT for declaratory and injunctive relief; Filing Fee $ 120.00 Receipt # 156566 (sbc) [Entry date 01/14/94]

* * *

1/28/94	11	ORDER of designation of Three-Judge Court; designated are Circuit Judge J. L. Edmondson, and District Judge B. Avant Edenfield to sv with the Requesting Judge, Dudley H. Bowen, Jr. (signed by Chief Judge B. Avant Edenfield and Judge James Edmondson (sbc) [Entry date 02/08/94]

* * *

3/10/94 25 ANSWER to Complaint by Thomas Murphy (Attorney Nicholson) (sbc)

* * *

3/18/94 36 MOTION by Davida Johnson, Pam Burke, Henry George Deloach, George Seaton for Temporary Restraining Order, for Preliminary Injunction to move the filing period for candidates to the United States House of Representatives, to enjoin further election proceedings for the United States House of Representatives from the State of Georgia under the existing congressional redistricting plan with brief in support. (sbc) [Entry date 03/21/94]

* * *

3/30/94 39 ORDER granting [16-1] motion to Intervene as a party deft, granting [13-1] motion for lv to Intervene as defts, mooting [32-1] motion for Leave to File supplemental brief in opp to private citizens to intervene, mooting [12-1] motion for Leave to File reply brief, Motion Hearing set for 9:00 4/18/94 for [36-2] motion for Preliminary Injunction to move the filing period for candidates to the United States House of Representatives, set Answer deadline to 4/7/94 for United States; directing Clk to file the Abrams applicants' proposed answer in intervention. (signed by Judge Dudley H. Bowen, Jr.); copies served. (sbc)

* * *

3/30/94	41	ANSWER to Complaint by Lucious Abrams, Jr., G.L. Avery, William Gary Chambers, Sr., Judy Lammers, Rita Valenti, Karen Watson. (sbc) [Entry date 03/31/94]
		* * *
4/1/94	45	ANSWER to Complaint by Zell Miller, Pierre Howard, Max Cleland (Attorney Dennis Robert Dunn, David F. Walbert) (ljf)
		* * *
4/7/94	52	ANSWER to Complaint by United States. (sbc)
		* * *
4/18/94	--	Motion hearing held re: [36-2] motion for Preliminary Injunction to move the filing period for candidates to the United States House of Representatives by George Seaton, George DeLoach, Henry Zittrouer, Pam Burke, Davida Johnson. Court Reporter: Richard Dueringer; there will be no ruling on the merits of the case; the Court would like a trial on the merits completed before the July primaries. (sbc) [Entry date 04/19/94]
4/19/94	--	Motion hearing continued re: [36-2] motion for Preliminary Injunction to move the filing period for candidates to the United States House of Representatives by George Seaton, George Deloach, Henry Zittrouer, Pam Burke, Davida Johnson. Court Reporter: Richard Dueringer; pltfs' mot for preliminary injunction is denied; ruling read into the

record by Judge Edmondson; Ord to be entered by the Court; defts will not present evidence in this hearing; proposed trial schedule, pretrial order due 6/13/94, pretrial conference set 6/23/94, trial set 7/18/94-7/25/94. (sbc)

* * *

4/19/94 74 ORDER denying [36-1] motion for Temporary Restraining Order, denying [36-2] motion for Preliminary Injunction to move the filing period for candidates to the United States House of Representatives, denying [36-3] motion to enjoin further election proceedings for the United States House of Representatives from the State of Georgia under the existing congressional redistricting plan (signed by Judge James L. Edmondson); copies served. (sbc)

* * *

5/2/94 78 TRANSCRIPT of proceedings before Honorable Dudley H. Bowen, Jr., Honorable Chief Judge B. Avant Edenfield, and Honorable James L. Edmondson for dates of 4/18/94 and 4/19/94 in Augusta, Georgia. (sbc)

* * *

6/6/94 118 ORDER granting [106-1] motion for expedited decision respecting mot to compel discv from deft intervenor USA, granting in part, denying in part [87-1] motion to Compel discv from deft Intervenor USA (signed by Judge Dudley H. Bowen, Jr.); copies served. (sbc)

* * *

6/13/94 126 ORDER granting in part and denying in part the motion of the United States, filed in the USDC for the District of Columbia and referred to this Court for disposition, for a protective order regarding the depsn of John Dunne (signed Judge Dudley H. Bowen Jr.); copies served. (sbc) [Entry date 06/14/94]

* * *

6/14/94 128 ORDER dismissing as moot [86-1] motion to Compel defts resp to interrogs and requests for prod of doc, granting [89-1] motion for Leave to file Amicus Curiae Brief, granting [101-1] motion for Leave to File reply brief and attached affidavit with exhibit and memo in support thereof, granting [92-1] motion to amend [1-1] complaint to correct if actual error in the complaint with regard to Pltf DeLoach, denying [79-1] motion to dismiss George DeLoach as a plaintiff, signed by Dudley H. Bowen, Jr.); copies served. (sbc)

* * *

7/21/94 -- Bench trial held; Court Reporter: Lora Carter; The preliminary injunction record will be included in the trial record; Stipulations will be a part of the record with ability of the lawyers to raise material questions; mot in limine by DOJ regarding evidence is denied w/o prej; mot to dism claim against USA is denied; pltfs' cnsl asked the Crt to inscribe the rule of

sequestration – so allowed, with instructions to cnls to consider the parameters of this request. (sbc) [Entry date 07/27/94]

7/22/94 -- Bench trial continued; Court Reporter: Lora Carter; Court, at request of pltfs' cnsl, w/drew rule of sequestration. (sbc) [Entry date 07/27/94]

* * *

7/23/94 -- Bench trial continued; Court Reporter: Lora Carter; Crt intends to conclude this case by 8/5/94. (sbc) [Entry date 07/27/94]

7/25/94 -- Bench trial continued; Court Reporter: Lora Carter; sequestration not in effect for general witnesses. (sbc) [Entry date 08/01/94]

7/26/94 -- Bench trial continued; Court Reporter: Lora Carter; the Court, through Judge Edmondson, read to cnsl the Judicial notice taken by the Crt as to Georgia's discrimination history against the black race. (sbc) [Entry date 08/01/94]

7/26/94 192 STATEMENT OF JUDICIAL NOTICE; Court Exhibit #2 of trial exhibits to be made a part of the record. (sbc) [Entry date 08/03/94]

7/27/94 -- Bench trial continued; Court Reporter: Lora Carter; the matter of certain witnesses having been threatened will be referred to the United States Attorney; offer of proof will be accepted on 7/28/94 in re Howard Schretter; in re the expert reports of Dr. Marsha Darling, the Crt

will receive the revised report as an offer of proof. (sbc) [Entry date 08/01/94]

7/28/94 -- Bench trial continued; Court Reporter: Lora Carter; Crt instructed cnsl to file conclusion of law, supported by citations of authority by 8/8/94. (sbc) [Entry date 08/01/94]

* * *

9/12/94 205 MEMORANDUM OPINION AND ORDER; Ct grants pltf's request for injunctive relief and will impose a revised plan. Congressional elections in the Eleventh District are enjoined until further order. Ct reserves decision and Jurisdiction to reconfigure the Eleventh Congressional District; Ct also reserves decision and jurisdiction to order required modifications to the First and Tenth Districts as the need arises. (signed by Judge Dudley H. Bowen Jr. and Chief Judge B. Avant Edenfield; dissenting opinion by Judge Edmondson); copies served. (bmm) [Entry date 09/14/94]

* * *

9/14/94 207 NOTICE OF APPEAL to U.S. Supreme Court by Zell Miller, Pierre Howard, Max Cleland; copies served. [205-1] order (bmm)

9/14/94 208 NOTICE OF APPEAL to U. S. Supreme Court by Lucious Abrams, Jr., G. L. Avery, William Gary Chambers Sr., Karen Watson. FILING FEE $ 5.00 RECEIPT # 160466; copies served. [205-1] order (bmm)

* * *

9/20/94 212 NOTICE OF APPEAL by United States to the United States Supreme Court. copies served. [205-1] order (sbc) [Entry date 09/21/94]

9/22/94 213 AMENDED NOTICE OF APPEAL by United States to the Supreme Court of the United States. copies served. [205-1] order (sbc)

* * *

9/26/94 217 AMENDED NOTICE OF APPEAL by Zell Miller, Pierre Howard, Max Cleland to the United States Supreme Court. copies served. [205-1] order (sbc)

SUBSTITUTE JOINT SUBMISSION OF THE PARTIES

* * *

EXHIBIT A JOINT STATEMENT OF UNDISPUTED FACTS

* * *

A. No Fact or Materiality Dispute

1. Pursuant to the results of the 1980 Decennial Census, the State of Georgia was entitled to ten Members in the United States House of Representatives. Due to the population increase recorded by the 1990 Decennial Census, the State of Georgia is now entitled to 11 members in the United States House of Representatives.

2. The increase in the size of Georgia's Congressional Delegation following the 1990 Decennial Census required the State of Georgia to redistrict the State's Congressional districts so that each of the 11 Congressional districts would have approximate equality in population.

3. The 1990 Decennial Census reports that the State of Georgia's population is 6,478,216 persons of whom 1,746,565 (26.96%) are black persons. Abrams Exhibit 1.

4. The total voting age population of Georgia is 4,750,913, of which 3,490,414 (73.5%) are white and 1,168,142 (24.6%) are black. 1990 Census, Table 1, at p. 1. Abrams Exhibit 1.

5. The Office of the Georgia Secretary of State compiles and maintains records of the number of registered voters in the State of Georgia, by race. Those records show that as of the November 1992 general election there were 3,177,061 persons registered to vote in Georgia, of

whom 698,305 (21.98%) were black. The 1990 Census reported a voting age population in Georgia of 4,750,913 of whom 1,168,142 were black and 3,490,414 were white. Based upon these figures, 59.8 percent of the state's black voting age population was registered to vote, as compared to 70.22 percent of the state's white voting age population.

6. The State of Georgia is subject to the preclearance procedures of § 5 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq*. Accordingly, redistricting legislation enacted by the Georgia Legislature cannot take effect and is unenforceable as law without either a judgment from the U.S. District Court for the District of Columbia declaring that the redistricting legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the U.S. Attorney General.

7. The reapportionment committees in the Georgia House and Senate began to consider the current reapportionment (based on the 1990 census) during the 1991 session of the General Assembly. The members of the House and Senate Reapportionment Committees are set forth in State Exhibits 1 & 2.

8. The Senate Reapportionment Committee met on January 29, 1991, and procedural rules were generally agreed upon at that time. A meeting schedule was also adopted. The committee members discussed public accessibility and participation. Linda Meggers of the Reapportionment Services Office gave a census update.

9. On January 31, 1991, the House reapportionment committee met. Rules were discussed and unanimously

adopted. The committee members also discussed scheduling and hearings to obtain public input. Linda Meggers gave the committee a census update.

10. The next Senate reapportionment committee meeting was February 4, 1991, and among others, Attorney General Michael Bowers and legislative counsel Sewell Brumby spoke. They addressed the pending voting litigation (the *Brooks* judicial and majority vote cases) and various aspects of the Voting Rights Act, including Sections 2 and 5.

11. On February 6, 1991, the House reapportionment committee met. Sewell Brumby, among others, addressed the committee and generally discussed the reapportionment process, including Sections 2 and 5 of the Voting Rights Act.

12. It was then anticipated that a special session for reapportionment of the State House, State Senate and congressional districts would be held later in 1991. At its February 20, 1991 meeting, the House reapportionment committee decided that it would conduct all of its public hearings before the committee itself drew any plans, which they wanted to try and do in June.

13. On February 27, 1991, the congressional subcommittee of the House Reapportionment Committee unanimously adopted guidelines. The Senate subcommittee met and adopted guidelines substantially similar to those of the House on February 28, 1991.

14. On February 28, 1991, both the House and Senate reapportionment committees adopted guidelines for

congressional and State legislative reapportionment. Copies of these guidelines is State Exhibits 3 & 4.

15. These guidelines provided for public hearings throughout the State to receive input from all sectors of the public. General guidelines required, among other things, that all reapportionment maps follow census geographic boundaries and that they be accompanied by statistical documents showing total population and the minority population for each proposed district.

16. These guidelines required that reapportionment plans adhere to the requirement of one person, one vote.

17. One of these guidelines also required that reapportionment plans not dilute minority voting strength and that plans comply with Sections 2 and 5 of the Voting Rights Act.

18. Further guidelines stipulated that all districts be composed of contiguous areas, and that areas which met only at points were not to be considered contiguous.

19. Another guideline of the House reapportionment committee stipulated that, if the first five guidelines (including those set forth hereinabove) were met, then efforts to maintain the integrity of political subdivisions, maintaining the cores of existing districts, and avoiding pitting incumbents against one another, could be taken into consideration.

20. The final general guideline of the House reapportionment committee was that local voting precinct boundaries should serve as the basic district building blocks so as to minimize voter confusion and the cost of election administration. When precinct boundaries were

broken, this guideline stipulated that the district lines should follow census block information.

21. Public hearings were then held throughout the State of Georgia where the input of any and all citizens who wished to speak or submit written information was received. All but one of these public hearings occurred between April 22 and May 21, 1991. The other one was held August 19, 1991. The meetings were held under the auspices of the House and Senate Reapportionment Committees sitting together.

22. Plans and ideas were submitted by members of the public at the public hearings. The House and Senate Reapportionment Committees met on a number of occasions to consider the plans after the conclusion of the public hearings.

23. In addition, a special session of the General Assembly was held from August 19 to September 5, 1991 for the purpose of adopting reapportionment plans, congressional districts and for the State, House and Senate.

24. During the public hearings, the work sessions of the Reapportionment Committees, and the special reapportionment session of the General Assembly, a great many congressional reapportionment plans were proposed and introduced.

25. The alternative plans or partial plans developed during the reapportionment process included or proposed between one and three majority black districts.

26. Between October 1991 and April 1992, three Congressional redistricting plans were submitted on

behalf of the State of Georgia to the U.S. Attorney General for preclearance pursuant to the Voting Rights Act. All of these plans were enacted by the Georgia General Assembly and approved by the Governor prior to their submission.

27. The first congressional reapportionment plan enacted by the special session and signed into law by the Governor was designated SB2EXASPASS. That plan is depicted in State Exhibit 65. The demographics of this plan are as follows:

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	588541 -0.07	179809 30.55	426558 72.48	118631 27.81
2	587346 -0.27	231843 39.47	415158 70.68	146861 35.37
3	594388 0.93	151788 25.54	429219 72.21	100115 23.32
4	583712 -0.89	57366 9.83	448139 76.77	41316 9.22
5	591871 0.50	367747 62.13	440208 74.38	254608 57.84
6	589283 0.06	36305 6.16	442764 75.14	26366 5.95
7	593007 0.69	80689 13.61	434613 73.29	53831 12.39
8	593485 0.77	160797 27.09	429481 72.37	105418 24.55
9	589420 0.08	21520 3.65	439083 74.49	15164 3.45
10	583663 -0.89	104932 17.98	430351 73.73	70720 16.43
11	583500 -0.92	353769 60.63	415339 71.18	235112 56.61
Totals	6478216	1746565	4750913	1168142

Number of Districts:	11	
Members Per District:	1	
Ideal District Size:	588929	
Average Deviation (%):	0.55	
Deviation Range (%):	-0.92	to 0.93
Overall Deviation (%):	1.85	

28. One of the purposes underlying the drawing of the eleventh congressional district in this plan was to attempt to bring together in that district a significant number of African-American voters in order to increase the opportunity of African-American voters to elect a candidate of their choice.

29. The first Congressional redistricting plan was submitted to the State of Georgia to the Department of Justice ("DOJ") on or about October 1, 1991. See Plaintiffs' Exhibit 1. The U.S. Attorney General objected to the first Congressional redistricting plan offered by the State of Georgia and refused preclearance by letter dated January 21, 1992. See Plaintiffs' Exhibit 2; State Exhibit 6.

30. The U.S. Attorney General stated in his objection letter that the State of Georgia had not carried its burden of proof under Section 5. The objection letter also made several specific comments concerning the congressional reapportionment plan. *Id.*

31. In response to the U.S. Attorney General's objection to the configuration for the Second District and the Eleventh Congressional Distirct [sic] as proposed by the State of Georgia in its first submission to the DOJ, Georgia Attorney General Michael J. Bowers stated his disagreement with the DOJ's position in his letter of March 3, 1992.

32. In 1991 and 1992, Oscar N. Persons served as General Counsel for the Georgia Republican Party, and further served as a Republican Party representative on the State Board of Elections. In 1991 and 1992, Mr. Persons was assisted in his efforts on behalf of the Georgia

Republican Party by Frank B. Strickland. These individuals jointly filed a Comment under Section 5 to the DOJ, as counsel for a Georgia non-profit corporation named "Georgians for Fair Redistricting, Inc.," wherein they sought to enhance black voting strength in three Congressional districts. They sought to shield this Comment from disclosure under the Freedom of Information Act. See Plaintiffs' Exhibit 31.

33. On February 12, 1992, the case of *Jones v. Miller*, 1:92-CV-0330-JOF was filed in the U.S. District Court, Northern District of Georgia. See Plaintiffs' Exhibit 32. The Complaint sought to have the Court impose the "maximum number of majority black districts." (Complaint, p. 4.). Messrs Persons and Strickland were attorneys of record for the Plaintiffs.

34. Subsequent to the DOJ objection of January 21, 1992, many other plans were introduced and considered by the reapportionment committees and the House and Senate themselves. A new plan was ultimately adopted by the conference committee on February 27, 1992. This second plan was enacted and signed into law by the Governor. This plan is depicted in State Exhibit 68.

The demographic breakdown of this plan is as follows:

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	594161 0.89	178895 30.11	430559 72.47	117944 27.39
2*	583230 -0.97	286629 49.15	409358 70.19	184258 45.01
3	593692 0.81	110703 18.65	430538 72.52	73441 17.06
4	588293 -0.11	67968 11.55	448179 76.18	48225 10.76
5	586485 -0.41	365206 62.27	440910 75.18	253413 57.47
6	587116 -0.31	35366 6.02	438845 74.75	25567 5.83
7	588073 -0.15	75813 12.89	431941 73.45	50533 11.70
8	590739 0.31	132546 22.44	427279 72.33	84338 19.74
9	586222 -0.46	21516 3.67	436725 74.50	15161 3.47
10	591987 0.52	108029 18.25	438898 74.14	73152 16.67
11	588218 -0.12	363894 61.86	417681 71.01	242110 57.97
Totals	6478216	1746565	4750913	1168142

Number of Districts:	11	
Members Per District:	1	
Ideal District Size:	588929	
Average Deviation (%):	0.46	
Deviation Range (%):	-0.97	to 0.89
Overall Deviation (%):	1.86	

*Without Fort Benning, black percentage is 50.00 percent population and black VAP is 45.82 percent.

35. This plan was submitted to the Department of Justice pursuant to Section 5 on or about March 3, 1992 (see Plaintiffs' Exhibit 4), but it was objected to by U.S. Attorney General on March 20, 1992. A true and authentic copy of that objection letter is State Exhibit 7; Plaintiffs' Exhibit 6. The U.S. Attorney General stated in his objection letter that the State of Georgia had not carried its burden of proof under Section 5. The objection letter also made several specific comments concerning the congressional reapportionment plan. *Id.*

36. The General Assembly enacted a third plan on March 31, 1992, and it was submitted to the Department of Justice on April 1, 1992. This plan was identified as CONGRESS.C1992 also known as HB1657. The plan was precleared under Section 5, it was used for the 1992 congressional elections, and it is the plan now before this court.

37. This plan is depicted in State Exhibit 66, and the demographics of this plan are as follows:

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	589540 0.10	133615 22.66	429073 72.78	87199 20.32
2*	591740 0.48	335082 56.63	415807 70.27	217571 52.32
3	591328 0.41	105263 17.80	429343 72.61	69800 16.26
4	588293 -0.11	67968 11.55	448179 76.18	48225 10.76
5	586485 -0.41	365206 62.27	440910 75.18	253413 57.47
6	587118 -0.31	35366 6.02	438847 74.75	25567 5.83
7	588071 -0.15	75813 12.89	431939 73.45	50533 11.70
8	591574 0.45	124234 21.00	427417 72.25	78508 18.37
9	586222 -0.46	21516 3.67	436725 74.50	15161 3.47
10	591644 0.46	106916 18.07	439254 74.24	72631 16.54
11	586201 -0.46	375586 64.07	413419 70.53	249534 60.36
Totals	6478216	1746565	4750913	1168142

Number of Districts: 11
Members Per District: 1

Ideal District Size: 588929
Average Deviation (%): 0.35
Deviation Range (%): -0.46 to 0.48
Overall Deviation (%): 0.94

*Without Fort Benning, black percentage is 57.83 percent population and black VAP is 53.46 percent.

38. On April 2, 1992, the U.S. Attorney General accepted the third proposed Congressional redistricting plan submitted by the State of Georgia as being in compliance with § 5 of the Voting Rights Act. See Plaintiffs' Exhibit 9. Said plan as later amended is presently embodied in O.C.G.A. § 21-2-4.

39. This final plan, CONGRESS.C1992, received the minimum 91 votes necessary for passage in the House of Representatives. The ninety-first vote was cast by the Speaker of the House, Representative Thomas Murphy. A copy of the March 31, 1992 roll call vote of the Georgia House of Representatives is attached as State Exhibit 5.

40. At the time this plan was enacted, the State of Georgia had been sued in the Northern District of Georgia by plaintiffs challenging the old reapportionment on the basis of one person/one vote deviations. A hearing on plaintiff's preliminary injunction motion was scheduled April 3, 1992, the week after the end of the legislative session. *Jones v. Miller,* (No. 1-92-CV-330-JOF (N.D.Ga.))

41. At no time in the Congressional redistricting process following the 1990 Decennial Census did the State of Georgia seek any judicial remedy authorized under the Voting Rights Act. The State was litigating a § 5 declaratory judgment action it had initiated with respect to the *Brooks* judicial litigation.

42. The state acknowledges that race was a significant consideration in the configuration of the Eleventh

Congressional District, including being a consideration in the inclusion of certain portions of DeKalb County, the City of Augusta, and the City of Savannah in the Eleventh Congressional District.

43. In the 1992 Congressional elections in Georgia, three black representatives were elected to Congress, Sanford Bishop in the Second District, John Lewis in the Fifth District and Cynthia McKinney in the Eleventh District.

44. In the 1992 general Congressional Democratic Primary Election, four African-American candidates received 74.8% of the total vote in the Eleventh District. Cynthia McKinney individually received 31.2% of the vote. The sole white candidate, George DeLoach, received 25.2% of the vote. See plaintiffs' Exhibit 17 and 18.

45. Because no candidate received a majority of the votes cast in the 1992 general Democratic primary election for the Eleventh Congressional District, the two top vote-getters, McKinney and DeLoach competed in an August 11, 1992, primary runoff election. McKinney became the Democratic nominee, winning 56.4% of the vote compared to 43.6% of the vote for DeLoach.

46. In the 1992 General Election for the Eleventh Congressional District, Cynthia McKinney ran as a Democrat against a white Republican, Woodrow Lovett. McKinney received 73.1% of the vote in such election. Lovett received 26.9%.

47. Democratic candidate Cynthia McKinney was a member of the Georgia General Assembly when she ran for the U.S. Congress from the Eleventh Congressional

District in 1992. George DeLoach, the Democratic candidate who lost to McKinney in the primary runoff, was the mayor of Waynesboro, Georgia, at the time. According to the 1990 census, Waynesboro, Georgia, has a total population of 5,701. Republican candidate Woodrow Lovett had never run for public office prior to his 1992 bid for election to the U.S. Congress for Georgia's Eleventh District.

48. In the 1992 general primary election for the Eleventh Congressional District, 83,868 votes were cast in the Democratic primary and 5,527 votes were cast in the Republican primary. In the 1992 primary runoff election for the Eleventh Congressional District, 69,690 votes were cast in the Democratic runoff and 3,420 votes were cast in the Republican runoff. In the 1992 general election for the Eleventh Congressional District, 120,168 votes were cast for the Democratic candidate, and 44,221 votes were cast for the Republican candidate. More than eight times as many votes were cast for the Republican candidate in the general election than were cast for the Republican candidates in either of the primary elections.

49. The Eleventh Congressional District in its present configuration includes parts of eight counties (DeKalb, Henry, Baldwin, Wilkes, Twiggs, Richmond, Effingham and Chatham), and all of 14 other counties. The municipalities of Augusta, Savannah, Milledgeville, Avondale Estates and Washington are divided.

50. Based upon the 1990 Decennial Census, Georgia's Second Congressional District has a black voting age population of 52.23%. A black candidate prevailed in the

1992 General Congressional election in the Second District, receiving over 63% of the vote.

51. In the July 21, 1992, general Democratic primary election for the Second Congressional District, there were six candidates. Four of those candidates, including Sanford Bishop, are black; the other two candidates, including the then-incumbent Charles Hatcher are white. Hatcher, who received 39.8% of the vote, and Bishop, who received 21.1% of the vote, were the two top vote-getters in the general Democratic primary election.

52. Because no candidate received a majority of the votes cast in the 1992 general Democratic primary election for the Second Congressional District, the two top vote-getters, Hatcher and Bishop, competed in an August 11, 1992, primary runoff election. Bishop became the Democratic nominee, winning 53.1% of the vote compared to 46.9% of the vote for Hatcher.

53. Democratic candidate Sanford Bishop won the November 3, 1992, general election for the Second Congressional District with 63.7% of the vote. Republican candidate Jim Dudley received 36.3% of the vote.

54. In the 1992 general primary election for the Second Congressional District, 102,722 votes were cast in the Democratic primary and 3,397 votes were cast in the Republican primary. In the 1992 primary runoff election for the Second Congressional District, 78,731 votes were cast in the Democratic run-off and 1,729 votes were cast in the Republican run-off. In the 1992 general election for the Second Congressional District, 95,789 votes were cast for the Democratic candidate and 54,593 votes were cast for the Republican candidate. More than 16 times as

many votes were cast for the Republican candidate in the general election than were cast for the Republican candidates in either of the primary elections.

55. Based upon the 1990 Decennial Census, Georgia's Fifth Congressional District has a black voting age population of 57.47%. A black Democratic candidate John Lewis was elected and prevailed in the 1992 General Congressional election in the Fifth District, receiving over 72% of the vote.

56. In the 1990 Congressional elections, one Republican was elected to Congress in the State of Georgia. In the 1992 Congressional elections, four Republicans were elected to Congress in the State of Georgia.

57. Georgia's First Congressional District ["First District"] encompasses 10,470.6 square miles. Georgia's Second Congressional District ["Second District"] encompasses 10,134 square miles. Georgia's Third Congressional District ["Third District"] encompasses 3,828.9 square miles. Georgia's Fourth Congressional District ["Fourth District"] encompasses 443.2 square miles. Georgia's Fifth Congressional District ["Fifth District"] encompasses 405.8 square miles. Georgia's Sixth Congressional District ["Sixth District"] encompasses 585.9 square miles. Georgia's Seventh Congressional District ["Seventh District"] encompasses 3,703 square miles. 1990 Census, Table 1, General Characteristics of Persons, at p. 1. Abrams Exhibit 1. Georgia's Eighth Congressional District ["Eighth District"] encompasses 10,644.2 square miles. 1990 Census, Table 1, at p. 2. Abrams Exhibit 1.

[add 9th & 10th] Georgia's Eleventh Congressional District ["Eleventh District"] encompasses 6,784.2 square miles. 1990 Census, Table 1, at p. 2. Abrams Exhibit 1.

58. The United States Department of Justice has objected under Section 5 of the Voting Rights Act to proposed election changes in numerous instances between 1965 and March 31, 1994, finding that Georgia and certain local jurisdictions within Georgia had not carried their burden of proving that the proposed change had neither a discriminatory purpose nor a discriminatory effect. At least 29 of the objections in Georgia or its political subdivisions have involved districting plans. An authentic copy of a Department of Justice list of those objections is Exhibit U.S. 56. A number of those objections were subsequently withdrawn in whole or in part, as indicated in the exhibit.

59. Majority black districts in the 1992 redistricting plan for the Georgia Senate range from 79.74 percent black population to 56.79 percent black population. Abrams 23.

60. Majority black districts in the 1992 redistricting plan for the Georgia House of Representatives range from 91.55 percent black population to 52.46 percent black population. Abrams 24.

61. The members of the Georgia House of Representatives are elected from 180 single-member districts. Of those districts 42 have a majority black total population and 138 have a majority white total population. Thirty of the 42 (71.4%) majority-black districts are represented by black members and 12 of the 42 (28.6%) are represented

by white members. Of the 138 majority-white House districts, one (0.7%) is represented by a black member. Exhibits U.S. 57, Abrams 24.

62. Thirty of the thirty-one (96.8%) black members of the House are elected from majority-black districts. Exhibits U.S. 57, Abrams 24.

63. The members of the Georgia Senate are elected from 56 single-member districts. Of those districts 13 have a majority black total population and 43 have a majority white total population. Nine of the thirteen (69.2%) majority-black districts are represented by black members and four of the 13 (30.8%) are represented by white members. Of the 43 majority-white Senate districts, none are represented by a black member. Exhibits U.S. 57, Abrams 23.

64. One hundred percent of the black members of the Georgia Senate are elected from majority-black districts. Exhibits U.S. 57, Abrams 23.

65. The current Sixth Congressional District contains no whole counties and parts of five different counties.

66. The City of Marietta is split between two majority-white congressional districts, and Gwinnett County is split between three majority-white congressional districts.

67. Plaintiffs filed their complaint in this action on January 13, 1994. Service was executed as to defendant Murphy on January 14, 1994 and as to defendant Zell Miller on January 18, 1994.

68. Plaintiffs filed a motion seeking a temporary restraining order and preliminary injunction on March 18, 1994.

69. For both the Georgia State Senate and the Georgia State House of Representatives, the 1994 Session of the Georgia General Assembly began on January 10, 1994, and ended on March 16, 1994. Pursuant to Georgia law, the General Assembly is not scheduled to go back into session until the second Monday in January, 1995.

70. Georgia's congressional primary elections are scheduled to be held on July 19, 1994, with any necessary runoff elections on August 9, 1994. The candidate qualifying period for the primary elections is scheduled to be held April 25 through 29. The Georgia congressional general elections are scheduled to be held on November 8, with any necessary runoff elections on November 29, 1994. For independent candidates running in the November general elections, the qualifying period is from June 27, 1994, through July 1, 1994.

71. The Eleventh Congressional District comes approximately 58 miles short of traversing the state of Georgia, by one east-west measure.

72. The district encompasses coastal areas, flatlands, and portions of the Piedmont.

73. Eight counties in the Eleventh Congressional District, Hancock, Washington, Green, Wilkinson, Glascock, Taliaferro, Warren and Jefferson contain, according to the 1990 Decennial Census, 77,799 people, less than 13.5% of the population of the Eleventh Congressional District.

B. No Fact Dispute, But Materiality Dispute

74. The configuration of the Eleventh Congressional District has been the subject of commentary by the press, both in Georgia and nationally. An editorial in *The Atlanta Journal* describes the district as "grotesque." *The Wall Street Journal* editorial has described it as "bizarrely shaped." *The Augusta Chronicle* has described it as a "crazy-quilt." Along with Congressional districts in North Carolina and Louisiana, it was featured in the July 12, 1993 issue of *Time* magazine; and in the lead story in the February 14, 1994 edition of the *New York Times*. See Plaintiffs' Exhibits 19-23.

75. In 1992, the Department of Justice was part of the Administration of President George H.W. Bush, a Republican.

* * *

135. In Georgia, white households have a per capita income of $15,832, black households have a per capita income of $7,997, or 50.5 percent of the per capita income of whites. 1990 Census, Table 17, Selected Characteristics of Persons by Race and Hispanic Origin, at p. 49. Abrams Exhibit 1.

136. In Georgia, white households have a mean income of $41,043, black households have a mean income of $23,752, or 57.9 percent of the mean income of whites. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

137. In Georgia, of 1,757,768 white households, 90,861 (5.2%) have per capita income less than $5,000; of 573,290 black households, 94,391 (16.5%) have per capita

income less than $5,000. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

138. In Georgia, of 1,757,768 white households, 84,453 (4.8%) have per capita income of $100,000 or more; of 573,290 black households, 4,228 (0.7%) have per capita income of $100,000 or more. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

139. In Georgia, of 2,997, 958 white persons 25 years and over, 74.9 percent have high school diplomas or higher education, and 21.8 percent have bachelor's degree or higher education; of 954,209 black persons 25 years and over, 58.6 percent have high school diplomas or higher education and 11.0 have bachelor's or higher education. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

140. In Georgia, of 2,479,480 white persons 16 years and over in the labor force, 98,944 (4.0%) are unemployed; of 802,174 black persons 16 years and over in the labor force, 85,049 (10.6%) are unemployed. 1990 Census, Table 17, at p. 49. Abrams Exhibit 1.

141. In Georgia, of 1,279,452 white families, 79,248 (6.2%) have income below poverty level; of 418,583 black families, 114,519 (27.4%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

142. In Georgia, of 4,496,697 white persons, 394,561 (8.8%) have income below poverty level; of 1,678,436 black persons, 507,992 (30.3%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

143. In Georgia, of 313,042 white children under age five, 34,251 (10.9%) have income below poverty level; of

162,216 black children under age five, 70,953 (43.7%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

144. In Georgia, of 183,179 white persons 75 and over, 38,947 (21.3%) have income below poverty level; of 51,383 black persons 75 and over, 23,605 (45.9%) have income below poverty level. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

145. In Georgia, of 1,279,452 white families, 139,156 (10.9%) are female-headed households with no husband present; of 418,583 black families, 180,908 (43.2%) are female-headed households with no husband present. 1990 Census, Table 17, at p. 50. Abrams Exhibit 1.

146. In the Eleventh District, white households have a per capita income of $13,790, black households have a per capita income of $8,578 or 62.2 percent of the per capita income of whites. 1990 Census, Table 17, Selected Characteristics of Persons by Race and Hispanic Origin, at p. 59. Abrams Exhibit 1.

147. In the Eleventh District, mean income for white households is $34,577; mean income for black households is $26,373. 1990 Census, Table 17, at p. 59. Abrams Exhibit 1.

148. In the Eleventh District, of 79,462 white households, 4,666 (5.9%) have per capita income less than $5,000; of 120,271 black households, 16,845 (14.0%) have per capita income less than $5,000. 1990 Census, Table 17, at p. 59. Abrams Exhibit 1.

149. In the Eleventh District, of 79,462 white households, 1,795 (2.2%) have per capita income of $100,000 or

more; of 120,271 black households, 979 (0.8%) have per capita income of $100,000 or more. 1990 Census, Table 17, at p. 59. Abrams Exhibit 1.

150. In the Eleventh District, of 138,983 white persons 25 years and over, 71.6 percent have high school diplomas or higher education and 15.4 percent have bachelor's degrees or higher education; of 206,615 black persons 25 years and over, 62.2 percent have high school diplomas or higher education and 11.7 percent have bachelor's degrees or higher education. 1990 Census, Table 17, at p. 59. Abrams Exhibit 1.

151. In the Eleventh District, of 162,339 white persons 16 years and over in the labor force, 4,137 (2.5%) are unemployed; of 263, 059 black persons 16 years and over in the labor force, 17,982 (6.8%) are unemployed. 1990 Census, Table 17, at p. 59. Abrams Exhibit 1.

152. In the Eleventh District, of 56,404 white families, 3,776 (6.7%) have income below poverty level; of 91,041 black families, 20,543 (22.6%) have income below poverty level. 1990 Census, Table 17, at p. 60. Abrams Exhibit 1.

153. In the Eleventh District, of 12,437 white children under five, 1,460 (11.7%) live in poverty; of 34,344 black children under five, 12,098 (35.2%) live in poverty. 1990 Census, Table 17, at p. 60. Abrams Exhibit 1.

154. In the Eleventh District, of 10,383 white persons 75 and over, 2,303 (22.2%) live in poverty; of 9,869 black persons 75 and over, 4,425 (44.8%) live in poverty. 1990 Census, Table 17, at p. 60. Abrams Exhibit 1.

155. In the Eleventh District, of 56,404 white families, 6,892 (12.2%) were female-headed households with no husband present; of 91,041 black families, 37,489 (41.2%) were female-headed households with no husband present. 1990 Census, Table 17, at p. 60. Abrams Exhibit 1.

* * *

STANCE OF THE PARTIES

Defendants dispute the materiality of paragraphs 74 and 75. Newspaper editorial opinion about the Eleventh Congressional District is not probative of any issue in the case, and constitutes inadmissible hearsay and inadmissible opinion evidence. The identity and political party of the United States President in 1992 is also immaterial.

* * *

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' AND INTERVENORS' STIPULATIONS . . .

* * *

B. Socio-Economic Data: (Stips 135-155). Plaintiffs object to the relevancy and materiality of the stipulations the Defendants propose on certain socio-economic aspects of persons living in the Eleventh Congressional District for the reasons this type of information was deemed "spurious" in *Hays v. Louisiana*, 839 F.Supp. 1188, 1203, W.D.La. (1993).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON, et al.,	*	
Plaintiffs,	*	CV 194-08
vs.	*	(Filed Jun. 6, 1994)
ZELL MILLER, et al.,	*	
Defendants.	*	

ORDER

Before the Court in the above-captioned case are Plaintiffs' Motion to Compel Discovery from Intervenor-Defendant The United States of America and Motion for Expedited Decision on the Motion to Compel. The Motion for Expedited Decision is **GRANTED;** for the reasons which follow, the Motion to Compel is **GRANTED IN PART** and **DENIED IN PART.** The United States shall disclose information in a manner consistent with this Order.

I. Background

In this suit challenging the constitutionality of Georgia's Eleventh Congressional District, the Plaintiffs have sought various types of discovery information (more fully described below) from Intervenor-Defendant The United States of America through officials within the United States Department of Justice (hereinafter "DOJ"). The DOJ has objected to many of Plaintiffs' requests.

These objections are based generally on the disputed relevancy of the information sought, the privileged nature of much of the information sought, the duplicative nature of some of Plaintiffs' requests, the fact that much of the information has already been made available or will be made available to Plaintiffs when pretrial information is scheduled to be exchanged, and the vagueness or overbreadth of several of Plaintiffs' requests.

II. General Considerations

The following analysis pertains to the DOJ's general objections to Plaintiffs' interrogatories and requests for production of documents.[1]

A. Relevance

The DOJ first objects to the discovery sought because the information sought is not relevant to Plaintiffs' claims in the present lawsuit. The DOJ specifically argues that its preclearance decisions are not at issue in the present case, and indeed could not be at issue because the Department's preclearance decisions are not subject to judicial review. *See Morris v. Gressette*, 432 U.S. 491, 504-05 (1977).

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[1] The dispute over the deposition of John Dunne, former Assistant Attorney General for the Civil Rights Division of the Department of Justice, is the subject of a Motion for Protective Order in the District Court for the District of Columbia and is properly before that Court. The Motion to Compel the deposition of John Dunne will therefore not be directly addressed herein.

Relevance is a malleable concept, and it is a concept likely to play a more important role in admissibility decisions at trial than in the expedited discovery process in this case. At this point, Plaintiffs need only show that the information requested is reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed. R. Civ. P. Plaintiffs' Motion to Compel, however, requires a brief examination of relevance in this context.

An abbreviated statement of the central issues of the case will perhaps help focus the issues to determine whether the information now sought is likely to be relevant to those issues. First, the three-judge panel will be called upon at trial to determine whether the State of Georgia intentionally grouped its citizens into voting districts on the basis of race, or, in other words, whether the State engaged in intentional racial gerrymandering. *See Shaw v. Reno*, 508 U.S. ___, 113 S. Ct. 2816 (1993). Second, if racial gerrymandering is established, the panel must then decide whether the State has so classified its citizens in furtherance of any compelling state interest. *Id.* Finally, the panel must determine whether the State's plan is narrowly tailored to further any established compelling state interest. *Id.* Relevance will be determined against this backdrop.

i. The State's Intent

At the outset, the Court acknowledges – as it did in footnote two of the March 30, 1994 Order, granting the intervention of this Defendant – that the preclearance determinations of the DOJ are not subject to judicial review. *See Morris, supra,* at 504-05. Nevertheless, the

DOJ's positions are relevant to the State's decision to draft the current Congressional redistricting plan as it did.

That the DOJ's preclearance decisions have had a significant impact on the State's decision-making process cannot be denied. The DOJ primarily administers the Voting Rights Act. *See* 42 U.S.C. § 1973(c); *Perkins v. Matthews*, 400 U.S. 379, 391 (1971). The alternative to administrative preclearance – obtaining a declaratory judgment in the United States District Court for the District of Columbia, with the United States as the statutory defendant – also requires consideration of the DOJ's positions on a state's redistricting plan.[2]

The DOJ's refusals to preclear the State's first two congressional plans submitted may not be reviewed for their correctness; those refusals and communications regarding the preclearance process for the current plan may be probative, however, insofar as they may have provided the impetus for the drawing of the plan at issue here.

Ultimately, if the State is shown to have *intentionally* segregated its citizens on the basis of race, then an intentional racial gerrymander will be established regardless of the State's underlying motives for so doing. *See Hays v.*

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[2] In seeking intervention in this action, the DOJ noted that its own positions must be considered in either type of preclearance process, so a state seeking preclearance has a reasonable basis for concluding that it has "a compelling interest in enacting a new redistricting plan that would receive administrative preclearance from the Attorney General." Reply of United States in Intervention, at 4, n.4.

Louisiana, 839 F. Supp. 1188, 1195 (W.D. La. 1993). If such a gerrymander is shown, it may only be deemed a "lawful" classification if it has been narrowly tailored to further a compelling state interest. As with the issue of the State's intent, the DOJ's positions and the underlying factual basis for those positions are relevant to the issues of compelling state interests and narrow tailoring.

ii. Compelling State Interest

Defendants have asserted compliance with the Voting Rights Act as a compelling state interest in the present case.[3] As the primary arbiter of such compliance, *see Perkins, supra*, the DOJ's positions are relevant to this inquiry.

iii. Narrow Tailoring

Finally, Plaintiffs assert that the DOJ had a strong influence on the State's decision to include certain significant areas of the Eleventh Congressional District in the current plan. Defendants have asserted narrow tailoring

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[3] Compliance with the Voting Rights Act is certainly an important concern for lawmakers in states covered by the Act. It should be noted that compliance with a compelling state interest alone, however, cannot insulate a state's intentional racial gerrymandering. Given the additional requirement of narrow tailoring, states must search for the enigmatic range of permissibility between the *minimum* requirements of the Voting Rights Act and the *maximum* limits of the Equal Protection clause. *See Shaw, supra*, at 2831 (" . . . in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires").

in their defense of this action. The DOJ's positions on the structure of the submitted plans are clearly relevant to the question of whether the current congressional plan is narrowly tailored.

B. Deliberative Process Privilege

Although the DOJ's positions are relevant in many respects to the issues to be determined at trial, relevance alone does not settle the present discovery dispute. The DOJ has asserted the "deliberative process" privilege to shield the disclosure of certain information relating to its internal decision making.

The deliberative process privilege protects disclosure of communications, even though relevant, which are pre-decisional, non-factual, and non-public communications occurring within a federal agency. *See U.S. v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (discussing the privilege in the context of the nearly identical statutory exemption from disclosure under the Freedom of Information Act). Protecting the internal decision making processes of government agencies from public disclosure is meant to encourage the frank discussion of legal or policy matters *within* a governmental agency.

Some of the requested information (enumerated in section III below) falls within the deliberative process privilege and will be shielded from disclosure. The Court notes that much of the information falling within the scope of this privilege is available from other sources or

relates to subjects that are not subject to direct judicial review.

The Court also notes that the deliberative process privilege protects the collective thought process of the Department, but it does not protect the underlying *factual information* on which the DOJ based its deliberations or decisions unless that factual information cannot be separated from any protected information without disclosing the latter. *See EPA v. Mink*, 410 U.S. 73, 89 (1973).

There is also a diminished interest (if not a waiver of the privilege altogether) in shielding information reflecting the Department's deliberative processes once that information is communicated to individuals or entities outside the Department of Justice. The privilege will not extend to any individual or entity outside the Executive Branch or the Department of Justice. Factual information and any information which has been communicated to (or from) individuals or entities outside the DOJ must therefore be disclosed as Plaintiffs have requested.

If *in camera* inspection is necessary for determinations of the separability of factual and privileged information, requests can be made promptly to the undersigned district court judge.

C. Informer's Privilege

This case does not involve the typical criminal or investigative setting in which protecting the confidentiality of an informer is an urgent matter of public policy. To the extent that an informer's privilege exists at all in the present context, I find that the Plaintiffs' need to

prepare their case outweighs the DOJ's need to protect its information sources outside the Department regarding Georgia's Congressional redistricting. *See Han v. Food and Nutrition Service of the U.S. Dep't of Agriculture,* 580 F. Supp. 1564 (D.C.N.J. 1984). The informer's privilege will not serve to protect any of the information at issue in the present dispute.

If the DOJ has an *extraordinary* and compelling need in the case of a particular informer to keep the disclosed information from the purview of the general public, the Department can request an order of confidentiality as to that informer.

III. Specific Discovery Requests

A. Interrogatories

Bearing in mind the general considerations discussed above, I now turn to each of the DOJ's objections to Plaintiffs' interrogatories.

1) Plaintiffs' Interrogatory number 1 requests the DOJ to state each reason not already provided in its letter of January 21, 1992, for its refusal to grant preclearance for Georgia's first submitted Congressional redistricting plan.

The DOJ's answer to Plaintiffs' first interrogatory states that its reasons for denying preclearance for the State's first plan have been stated in the Department's disclosed letter of January 21, 1992. To the extent that additional reasons exist, the Department shall state all such reasons communicated to any individual or entity outside the DOJ. As discussed above, the Department's

communicated reasons may have had a bearing on the State's intent in drafting the current plan. The deliberative process privilege only protects pre-decisional *communications* occurring within federal agencies; a requested listing of the Department's *reasons* would not seem to fall within the privilege.

2) Plaintiffs' interrogatory number 2 is identical to the first except that it relates to the State's second submitted Congressional Plan. The same result applies for this second interrogatory.

3) Plaintiffs' interrogatory number 3 requests the DOJ to state every reason for its objection to the failure of Georgia's second plan to include certain specified populations of black voters in the Eleventh and Second Congressional Districts. Again, the same result applies.

4) Plaintiffs' interrogatory number 4 requests the DOJ to state whether it relied upon any socio-economic data in evaluating any of the State's 1991-1992 Congressional redistricting submissions, to identify the data so relied upon, to identify how such data was utilized, and to identify any communications with the State of Georgia concerning such data.

With the exception of the inquiry as to how such data was utilized, the information requested in Plaintiffs' interrogatory number 4 is the type of factual information that is not protected by the deliberative process privilege. The DOJ shall disclose all such data to the extent that it has not already been provided.

7) Plaintiffs' interrogatory number 7 requests the DOJ to identify all communications which DOJ personnel

had with individuals inside or outside the DOJ concerning Georgia redistricting in 1991 and 1992. The DOJ shall identify all communications with individuals or entities *outside* the Department as Plaintiffs have requested. The DOJ need not disclose any pre-decisional, non-factual, non-public, official communications occurring within the Department.

20) Plaintiffs' interrogatory number 20 asks: "do you contend that any congressional redistricting plans submitted to the DOJ for preclearance in 1991-92 reflected purposeful discrimination in the part of the State of Georgia?"

The DOJ appears to have answered this interrogatory in large part by stating that the current plan does not reflect purposeful discrimination and by stating that the State failed to meet its burden of proving the absence of racially discriminatory purpose in the first two plans. To the extent that the DOJ has formed an affirmative judgment on the State's intent in the first two plans, and to the extent that such a judgment was disclosed to any individual or entity outside the Department, the DOJ shall so respond to the remainder of Plaintiffs' interrogatory number 20.

B. Requests for Production of Documents

1) Plaintiffs' requests for production numbers 1 and 2 seek all correspondence and invoices between the DOJ and any expert "identified as a possible witness by Defendants in this case relating to other cases wherein such individuals were retained to testify on behalf of the

United States and/or other Plaintiffs where the Voting Rights Act was sought to be enforced to protect Black voting strength."

The DOJ objects to these requests on the grounds that the information requested is not relevant to the instant litigation and the identification and compilation of the requested documents would be unduly burdensome on the United States. The positions taken by the Defendants' experts in other Voting Rights Act litigation, however, are clearly relevant to their experts' testimony on the Voting Rights Act in the present case.

Given the vast resources of the DOJ, and given the intervention of the United States as a defendant in this action, it is not overly burdensome to require the DOJ to produce the requested information. The scope of the requested information shall be limited, however, to litigation occurring after the 1990 decennial census.

2) Plaintiffs' request for production number 3 seeks all correspondence by and between attorneys for the DOJ and any third party referencing the Congressional redistricting of Georgia necessitated by the 1990 census. With the exception of any work product of attorneys within the DOJ, the Department shall produce the information as Plaintiffs have requested.

3) Plaintiffs' request for production number 4 seeks all written communications from members of the Executive or Legislative Branches of the federal government to any DOJ employee regarding the Congressional redistricting plan in Georgia and the desire for DOJ intervention in the instant litigation.

The DOJ shall disclose all such communications from members of the Legislative Branch. The DOJ need not, however, disclose any non-public, pre-decisional, and non-factual official communications from individuals within the Executive Branch.

4) Plaintiffs' request for production number 5 seeks all documents or other data in the possession of the Intervenor U.S.A. at the time of the preclearance process for the Georgia Congressional Districting Plan that were relied upon in assessing whether white Georgians engaged in racial bloc voting.

To the extent that this request seeks pre-decisional, non-factual, non-public official communications within the Department of Justice concerning racial bloc voting, the DOJ shall not be required to disclose this information. To the extent that the request seeks information falling outside this description, such information shall be disclosed.

5) Plaintiffs' request for production number 6 seeks all documents in the possession of the DOJ that it believes to be probative of its contention that the Eleventh Congressional District is (a) geographically compact, (b) geographically contiguous, and (c) incorporates a black population that has a common community of interest and is politically cohesive.

The DOJ objects to this request on the ground that the request is vague. The DOJ also enumerates a number of documents which it believes to be responsive to Plaintiffs' request and to which the Plaintiffs already have access.

If the enumerated documents are the only documents intended to be used by the DOJ at trial, then its response was sufficiently responsive to Plaintiffs' broad request. If the Department possesses additional probative information which it intends to utilize in proving the described elements, then such information shall be disclosed to Plaintiffs.

6) Plaintiffs' request for production number 7 seeks all documents relating to the creation or perpetuation of the so called "65% Rule" within the DOJ. Since the DOJ denies, presumably in good faith, that such a rule exists within the United States Department of Justice, the Court is not able to compel the production of documents relating to such a rule.

7) Plaintiffs' request for production number 8 seeks all documents referencing a desire by any governmental official or third party to apply the "65% Rule" to Congressional redistricting in Georgia following the 1990 census.

The DOJ has answered this request by stating that it has provided Plaintiffs all of the presently requested information of which it is aware.

8) Plaintiffs' request for production number 9 seeks all documents relating to any advocacy within the DOJ for proportional minority representation or maximization of minority representation.

The DOJ denies that a policy of proportional minority representation or maximization exists within the Department, and the DOJ objects to this request on the grounds

that it is vague, overbroad, and burdensome. Any documents regarding advocacy – or attempts to influence individuals or entities *outside* the Department – of proportional minority representation or maximization (if such documents exist) shall be produced as Plaintiffs have requested, but the scope of this request shall be limited to the years following the 1990 decennial census.

9) Plaintiffs' request for production number 10 seeks all documents which Defendants intend to use as charts, graphs, or otherwise offer into evidence or display at trial in enlarged form to the Court.

The DOJ has sufficiently responded to this request, and Plaintiffs will receive the requested information according to the established Joint Discovery Plan.

10) Plaintiffs' requests for production numbers 11 and 12 seek "all documents you contend support any defense asserted in this action" and "all documents you believe may be probative of any claim or defense asserted in this action."

The DOJ objects to these requests in part on the grounds that they are vague, overbroad, and burdensome. The Court agrees with the Department as to these requests.

11) Plaintiffs' request for production number 14 seeks all documents, including correspondence and pleadings, in or relating to the case of *Brooks v. State Board of Elections*, CV288-146 (S.D. Ga.).

The pleadings in the *Brooks* action are readily available from sources other than the United States Department of Justice, and Plaintiffs may obtain them from

those sources if so desired. Correspondence regarding the *Brooks* case between attorneys for the Department of Justice and individuals outside the Department may bear upon the State's intent in drafting the present Congressional redistricting plan and shall be disclosed.

12) Plaintiffs' request for production number 15 seeks all documents, including correspondence and pleadings, in or relating to the case of *Busbee v. Smith*, Civil Action No. 82-0665 (D.D.C). The same result applies to the *Busbee* case as to the *Brooks* case, discussed above.

The parties shall promptly proceed with discovery as ordered herein. Requests for *in camera* inspection, if and when necessary, shall be made as discussed above

ORDER ENTERED at Augusta, Georgia, this 6th day of June, 1994.

/s/ Dudley H. Bowen, Jr.
UNITED STATES
DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

No. 94-631

Zell Miller, et al.

Appellants

v.

Davida Johnson, et al.

(Filed Jan. 17, 1995)

APPEAL from the United States District Court for the Southern District of Georgia. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 94-797, *Lucious Abrams, Jr., et al. v. Davida Johnson, et al.* and 94-929, *United States v. David Johnson, et al.* and a total of one hour is allotted for oral argument.

January 6, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-797

Lucious Abrams, Jr., et al.

Appellants

v.

Davida Johnson, et al.

(Filed Jan. 17, 1995)

APPEAL from the United States District Court for the Southern District of Georgia. The statement of jurisdiction in this case having been submitted and considered

by the Court, in this case probable jurisdiction is noted. This case is consolidated with 94-631, *Zell Miller, et al. v. Davida Johnson, et al.* and 94-929, *United States v. Davida Johnson, et al.* and a total of one hour is allotted for oral argument.

January 6, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-929

United States,

Appellant

v.

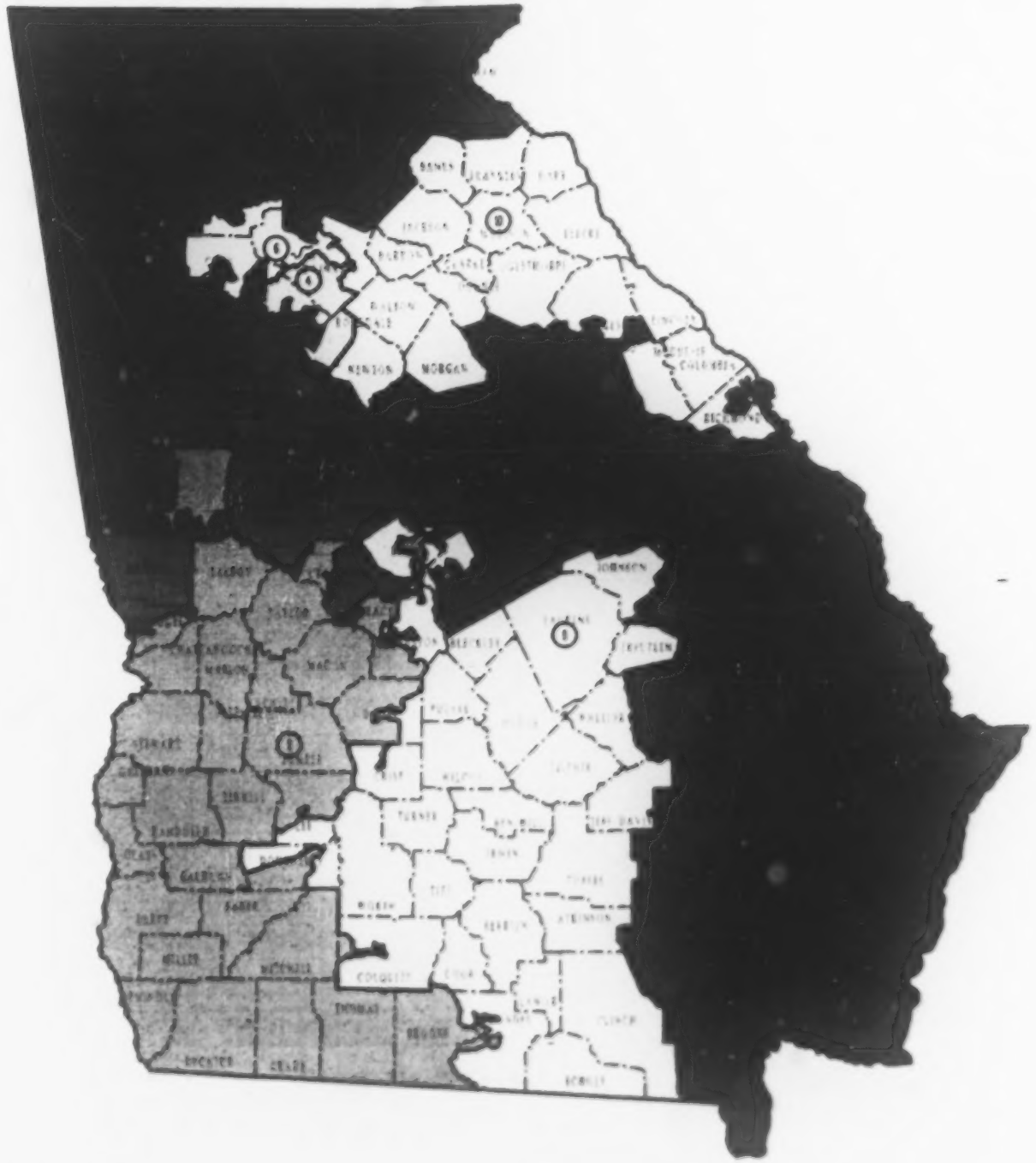
Davida Johnson, et al.

(Filed Jan. 17, 1995)

APPEAL from the United States District Court for the Southern District of Georgia. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 94-631, *Zell Miller, et al. v. Davida Johnson, et al.* and 94-929, *Lucious Abrams, Jr. et al. v. Davida Johnson, et al.* and a total of one hour is allotted for oral argument.

January 6, 1995

Joint Exhibit 1



Client : CONGRESS
Plan : C1992
Type : Congressional

County Boundaries
Precinct Boundaries
Railroads
Hydrography
Incorporated Places

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

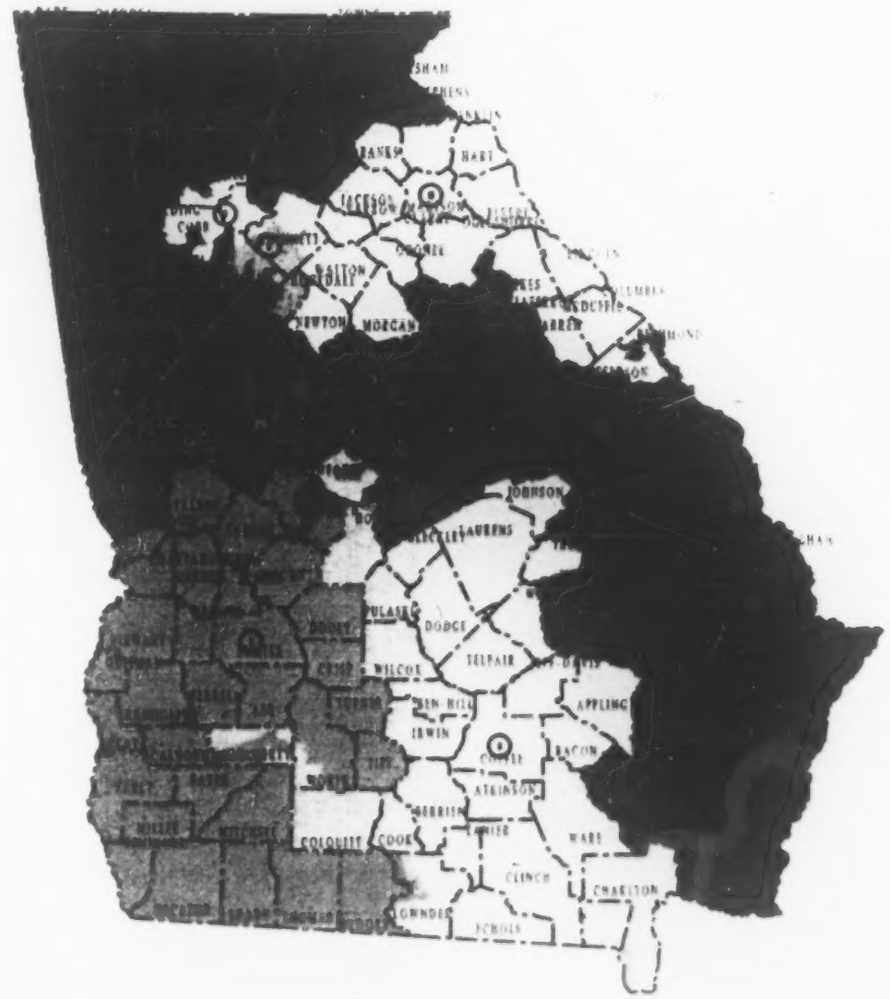
Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	589546	133616	429079	87200
	0.10	22.66	72.78	20.32
2	591699	335059	415777	217558
	0.47	56.63	70.27	52.33
3	591328	105263	429343	69800
	0.41	17.80	72.61	16.26
4	588293	67968	448179	48225
	-0.11	11.55	76.18	10.76
5	586485	365206	440910	253413
	-0.41	62.27	75.18	57.47
6	587118	35366	438847	25567
	-0.31	6.02	74.75	5.83
7	588071	75813	431939	50533
	-0.15	12.89	73.45	11.70
8	591615	124257	427447	78521
	0.46	21.00	72.25	18.37
9	586222	21516	436725	15161
	-0.46	3.67	74.50	3.47
10	591644	106916	439254	72631
	0.46	18.07	74.24	16.54
11	586195	375585	413413	249533
	-0.46	64.07	70.52	60.36
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.35
Deviation Range (%)	:	-0.46 to 0.47
Overall Deviation (%)	:	0.93

(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Joint Exhibit 2



Client : STATE
Plan : SB705CONF1
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

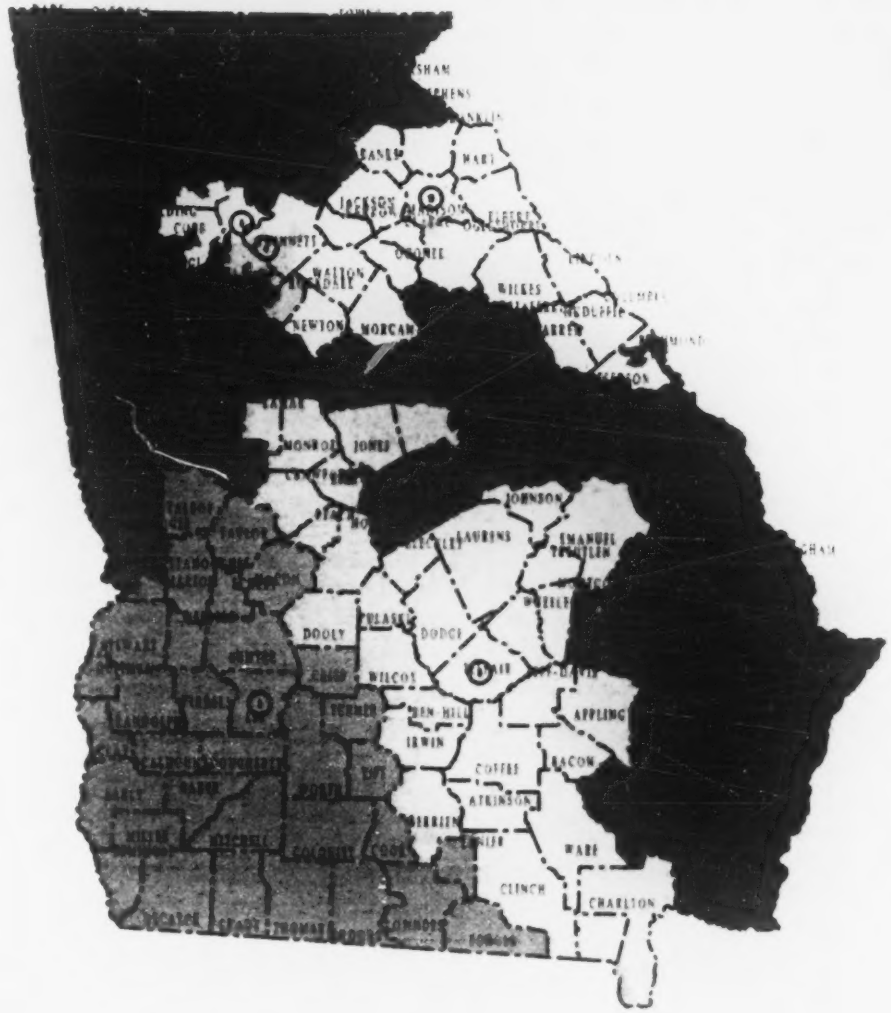
Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	594161 0.89	178895 30.11	430559 72.47	117944 27.39
2	583230 -0.97	286629 49.15	409358 70.19	184258 45.01
3	593692 0.81	110703 18.65	430538 72.52	73441 17.06
4	588293 -0.11	67968 11.55	448179 76.18	48225 10.76
5	586485 -0.41	365206 62.27	440910 75.18	253413 57.47
6	587116 -0.31	35366 6.02	438845 74.75	25567 5.83
7	588073 -0.15	75813 12.89	431941 73.45	50533 11.70
8	590739 0.31	132546 22.44	427279 72.33	84338 19.74
9	586222 -0.46	21516 3.67	436725 74.50	15161 3.47
10	591987 0.52	108029 18.25	438898 74.14	73152 16.67
11	588218 -0.12	363894 61.86	417681 71.01	242110 57.97
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.46
Deviation Range (%)	:	-0.97 to 0.89
Overall Deviation (%)	:	1.86

(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Joint Exhibit 3



Client : STATE
Plan : SB2EXASPASS
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

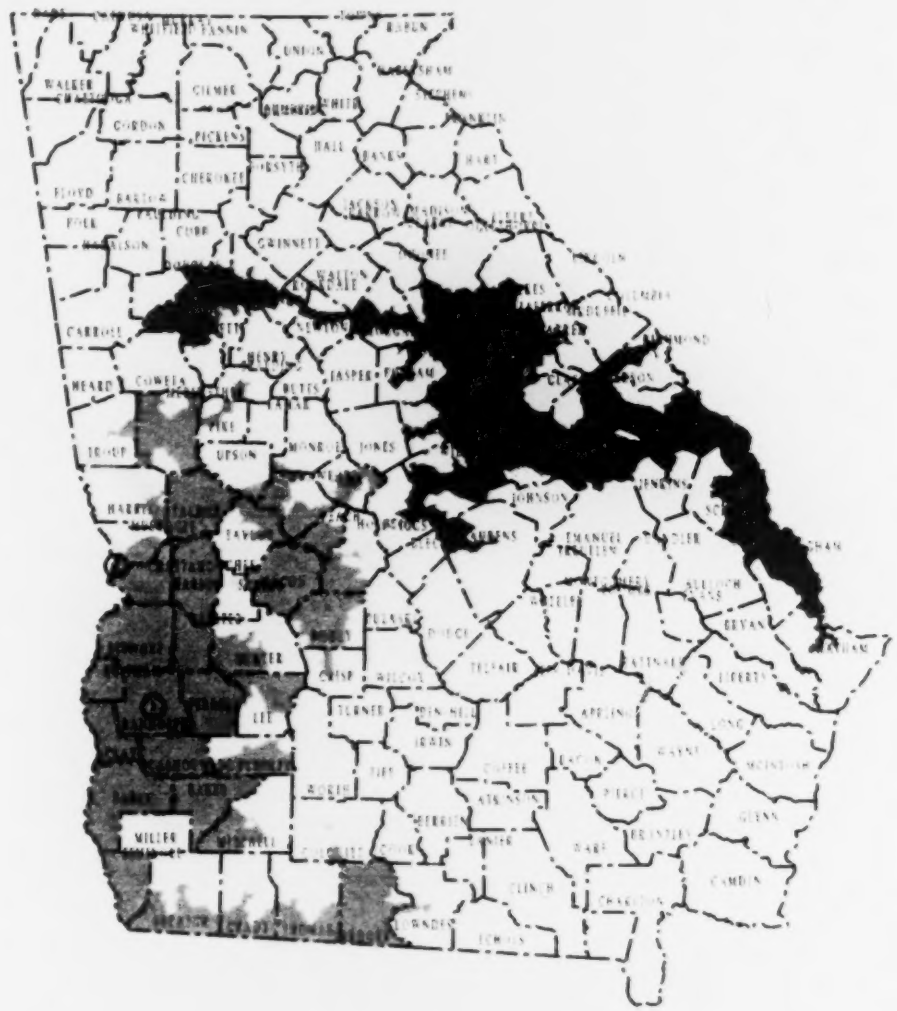
Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop %Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	588541	179809	426558	118631
	-0.07	30.55	72.48	27.81
2	587346	231843	415158	146861
	-0.27	39.47	70.68	35.37
3	594388	151788	429219	100115
	0.93	25.54	72.21	23.32
4	583859	57431	448236	41354
	-0.86	9.84	76.77	9.23
5	591871	367747	440208	254608
	0.50	62.13	74.38	57.84
6	589283	36305	442764	26366
	0.06	6.16	75.14	5.95
7	593007	80689	434613	53831
	0.69	13.61	73.29	12.39
8	593485	160797	429481	105418
	0.77	27.09	72.37	24.55
9	589420	21520	439083	15164
	0.08	3.65	74.49	3.45
10	583663	104932	430351	70720
	-0.89	17.98	73.73	16.43
11	583353	353704	415242	235074
	-0.95	60.63	71.18	56.61
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.55
Deviation Range (%)	:	-0.95 to 0.93
Overall Deviation (%)	:	1.87

(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Joint Exhibit 4



Client : MCKINNEY
Plan : BMCCONGRESS
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
2	586184 -0.47	341605 58.28	411508 70.20	221515 53.83
5	583857 -0.86	374437 64.13	432542 74.08	258659 59.80
11	588950 0.00	381034 64.70	415220 70.50	253046 60.94
Totals	1758991	1097076	1259270	733220

Number of Districts:	:	1
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.44
Deviation Range (%)	:	-0.86 to 0.00
Overall Deviation (%)	:	0.86

(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Joint Exhibit 8

Client : REDRAW
Plan : SREDRAW2
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	592896 0.67	141819 23.92	431321 72.75	92531 21.45
2	592257 0.57	302984 51.16	417544 70.50	196245 47.00
3	590336 0.24	116205 19.68	428736 72.63	77385 18.05
4	590170 0.21	58067 9.84	452790 76.72	41783 9.23
5	590462 0.26	372667 63.11	439129 74.37	257997 58.75
6	583113 -0.99	35502 6.09	437276 74.99	25766 5.89
7	588073 -0.15	75813 12.89	431941 73.45	50533 11.70
8	587297 -0.28	147178 25.06	423913 72.18	94030 22.18
9	589420 0.08	21520 3.65	439083 74.49	15164 3.45
10	586271 -0.45	107647 18.36	433229 73.90	72729 16.79
11	587921 -0.17	367163 62.45	415951 70.75	243979 58.66
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.37
Deviation Range (%)	:	-0.99 to 0.67
Overall Deviation (%)	:	1.66

(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Joint Exhibit 9

GUIDELINES ADOPTED BY THE HOUSE COMMITTEE ON CONGRESSIONAL AND LEGISLATIVE REAPPORTIONMENT AND REDISTRICTING
1991 – 1992

I. HEARINGS AND MEETINGS

A. PUBLIC HEARINGS

1. A series of public hearings will be held throughout the state to actively seek public participation and maximize public input before and after the committee's redistricting plans have been made.

2. The committee will hold at least 12 public hearings (one meeting in each congressional district and two additional meetings) throughout the state for the purpose of receiving input and commentary from all sectors of the public.

3. Minutes of all hearings should be kept and maintained as part of the public record. Copies of the minutes should be made available in a timely manner at a reasonable cost to cover the expense of copying from the Secretary of the Senate or Clerk of the House.

B. COMMITTEE MEETINGS

1. All meetings of the committee will be open to the public and should be conducted at times and places suitable to public participation and observation.

2. All committee meetings will be announced. Notices of all meetings will be posted at the House Clerk's Office and other appropriate

places at least 24 hours in advance of any meeting. Individual notices may be transmitted to any citizen or organization requesting the same without charge prior to the meeting by the most practicable means. Persons or organizations needing this information should contact the Senate or House Information Office or the Secretary of the Senate or Clerk of the House to be placed on the notification list.

These notice requirements will not apply during any regular or special session of the General Assembly.

3. A quorum of the Reapportionment Committee shall consist of a majority of the members of the committee.

4. Minutes of all meetings should be kept and maintained as part of the public record. Copies of the minutes should be made available in a timely manner at a reasonable cost to cover the expense of copying from the Secretary of the Senate or Clerk of the House.

II. PUBLIC ACCESS TO REDISTRICTING DATA AND MATERIALS

A. The Reapportionment Committee should comply fully with all applicable laws and rules which provide public access to the committee's meetings, documents, and records. All data bases on any medium created at public expense or held by the committee or by a contractor or consultant to the committee for use in the redistricting process are included as public records.

B. Copies of any public records on any medium created for, acquired by, or used in or

held for use in the redistricting process by the committee or by a contractor or consultant to the committee should be made available in accordance with the provisions of the Open Records Act, O.C.G.A. Section 50-18-70, et seq.

C. Copies of the public records described above may be obtained at the cost of reproduction by members of the public on computer tape or disk or other electronic media if the material exists on an appropriate electronic medium.

D. Access to the population data will be made available to the public through the Census State Data Center Affiliate at the University of Georgia at the cost of reproduction. Census maps will be made available to the public through an arrangement with Georgia Blue Printing at a cost of 20 cents per square foot with a minimum order of $7.50.

A single copy of summary population data at the precinct level and a state-wide work map will be made available to any individual member of the public through the Reapportionment Services Office at no cost.

III. REDISTRICTING PLANS

A. GENERAL GUIDELINES FOR PLANS

1. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization. All drafts of and amendments or revisions to plans presented at any public hearing or committee meeting, including those presented by members of the legislature, should be on clearly depicted maps which follow census geographic boundaries and should

be accompanied by a statistical sheet listing the census geography included, the total population, and the minority population for each proposed district.

All plans presented at committee meetings will be made available to the public.

2. Each legislative district of the General Assembly should be drawn to achieve substantial equality of population among the various districts. The population deviation for any legislative district should not exceed plus or minus 5 percent.

Each congressional district should approach the ideal district size as nearly as is practicable. Any deviation whatsoever must be justified by its necessity to meet a permissible state policy goal.

3. A redistricting plan should not have either the purpose or the effect of diluting minority voting strength and should otherwise comply with Sections 2 and 5 of the Voting Rights Act.

4. All legislative and congressional districts shall be single-member districts.

5. Districts should be composed of contiguous geography. Areas which meet at the points of adjoining corners are not contiguous.

6. Where the above-stated criteria are met, efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts and consideration may be given to avoiding contests between incumbents.

7. Local voting precinct boundary lines should serve as the basic district building block in order

to minimize voter confusion and cost of election administration. Where voting precinct boundary lines cannot be followed and also meet Guidelines 2 and 3 as stated above, district lines should follow census block geography in order to maintain the integrity of the statistical analysis.

B. PLANS PRODUCED BY LEGISLATORS

1. Committee staff will be available to all legislators requesting assistance. Census data and redistricting work maps will be available to all legislators upon request.

2. Redistricting plans and other records related to the provision of staff services to individual members of the General Assembly will not be subject to public disclosure; but this confidentiality will not apply with respect to records related to the provision of staff services to any committee or subcommittee or to any records which are or have been previously disclosed by or pursuant to the direction of an individual member of the General Assembly.

3. All drafts, amendments, or revisions should be on clearly depicted maps which follow census geographic boundaries and should be accompanied by a statistical sheet listing the census geography included, the total population, and the minority population for each district.

4. All plans submitted should either be a complete state-wide plan or fit back into the plan which they modified, so that the proposal can be evaluated in the context of a state-wide plan. All

pieces of census geography must be accounted for in some district.

C. THIRD-PARTY PLANS

1. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other committee public records.

2. Any individual citizen or organization may present a plan to the Reapportionment Committee by presentation at a public meeting or by written submission. Any redistricting plan developed outside the legislature or any redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the committee should:

(a) Be clearly depicted on census maps or on reapportionment work maps obtainable from the Reapportionment Office;

(b) Be accompanied by a statistical sheet listing total population and minority population and a listing of the census geography making up each proposed district;

(c) Stand as a complete plan for redistricting or, if presenting a partial plan, fit back into the committee's working plan (i.e., all pieces of geography must be accounted for in some district); and

(d) Comply with the guidelines adopted by the committee.

3. Electronic submissions of legislative and congressional redistricting plans will be accepted by the Reapportionment Committee. However, any plan submitted in a computer

readable media should comply with the guidelines for electronic submission as adopted jointly by the U.S. Justice Department and the Reapportionment Task Force of the National Conference of State Legislatures.

Joint Exhibit 10

SENATE REAPPORTIONMENT COMMITTEE

GUIDELINES FOR CONGRESSIONAL AND LEGISLATIVE REAPPORTIONMENT AND REDISTRICTING

1991-1992

(Adopted February 28, 1991)

1. HEARINGS AND MEETINGS

A. Public Hearings

1. A series of public hearings will be held throughout the state to actively seek public participation and maximize public input before and after the committee's redistricting plans have been made.

2. The committee will hold at least 12 public hearings (one meeting in each congressional district and two additional meetings) throughout the state for the purpose of receiving input and commentary from all sectors of the public.

B. Committee Meetings

1. All meetings of the committee will be open to the public and should be conducted at times and places suitable to public participation and observation.

2. All committee meetings will be announced. Notices of all meetings will be posted at appropriate places at least 24 hours in advance of any meeting. Individual notices may be transmitted to any citizen or organization requesting the same without charge prior to the meeting by the most practicable means. Persons or organizations needing this information should contact the Senate or

House Information Office or the Secretary of the Senate or Clerk of the House offices to be placed on the notification list.

These notice requirements will not apply during any regular or special session of the General Assembly.

3. A quorum of the Reapportionment Committee shall consist of eight (8) members.

4. Minutes of all meetings should be kept and maintained as part of the public record. Copies of the minutes should be made available in a timely manner at a reasonable cost to cover the expense of copying from the Secretary of the Senate or Clerk of the House offices.

II. PUBLIC ACCESS TO REDISTRICTING DATA AND MATERIALS

A. The Reapportionment Committee should comply fully with all applicable laws which provide public access to the committee's meetings, documents, and records. All databases on any medium created at public expense or held by the committee or by a contractor or consultant to the committee for use in the redistricting process are included as public records.

B. Copies of any public records on any medium created for, acquired by, or used in or held for use in, the redistricting process by the committee or by a contractor or consultant to the committee should be made available in accordance with the provisions of the Open Records Act, O.C.G.A. §50-18-70, et seq.

C. Copies of the public records described above may be obtained by members of the public on computer tape or

disk or other electronic media if the material exists on an appropriate electronic medium.

D. Access to the population data will be made available to the public through the Census State Data Center Affiliate at the University of Georgia at the cost of reproduction. Census maps will be made available to the public through an arrangement with Georgia Blue Printing at a cost of 20 cents per square foot with a minimum order of $7.50.

Summary population data at the precinct level and a statewide work map will be made available to the public through the Reapportionment Services Office at no cost.

III. REDISTRICTING PLANS

A. GENERAL GUIDELINES FOR PLANS

1. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization. All drafts of and amendments or revisions to plans presented at any public hearing or committee meeting, including those presented by members of the legislature, should be on clearly depicted maps which follow census geographic boundaries and should be accompanied by a statistical sheet listing the census geography included, the total population, and the minority population for each proposed district.

All plans presented at committee meetings will be made available to the public.

2. Each legislative district of the General Assembly should be drawn to achieve substantial equality of population among the various districts. The population deviation for any legislative district should not exceed plus or minus five percent.

Each congressional district should approach the ideal district size as nearly as is practicable. Any deviation whatsoever must be justified by its necessity to meet a permissible state policy goal.

3. A redistricting plan should not have either the purpose or the effect of diluting minority voting strength and shall otherwise comply with Sections 2 and 5 of the Voting Rights Act.

4. All legislative and congressional districts should be single-member districts.

5. Districts should be composed of contiguous geography. Areas which meet at the points of adjoining corners are not contiguous.

6. Where the above-stated criteria are met, efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts; and consideration may be given to avoiding contests between existing incumbents.

7. Local voting precinct boundary lines should serve as the basic district building block in order to minimize voter confusion and cost of election administration. Where voting precinct boundary lines cannot be followed and also meet Guidelines (III A.) 2 and 3 as stated above, district lines should follow census block geography in order to maintain the integrity of the statistical analysis.

B. PLANS PRODUCED BY LEGISLATORS

1. Committee staff will be available to all legislators requesting assistance. Census data and redistricting work maps will be available to all legislators upon request.

2. Redistricting plans and other records related to the provision of staff services to individual members of the General Assembly will not be subject to public disclosure. This confidentiality will not apply with respect to records related to the provision of staff services to any committee or subcommittee or to any records which are or have been previously disclosed by or pursuant to the direction of an individual member or the General Assembly.

3. All drafts, amendments, or revisions should be on clearly depicted maps which follow census geographic boundaries and should be accompanied by a statistical sheet listing the census geography included, the total population, and the minority population for each district.

4. All plans submitted should either be a complete statewide plan or fit back into the plan which they modified, so that the proposal can be evaluated in the context of a statewide plan. All pieces of census geography must be accounted for in some district.

C. THIRD-PARTY PLAN

1. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other committee public records.

2. Any individual citizen or organization may present a plan to the Reapportionment Committee by presentation

at a public meeting or by written submission. Any redistricting plan developed outside the Legislature or any redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the committee should:

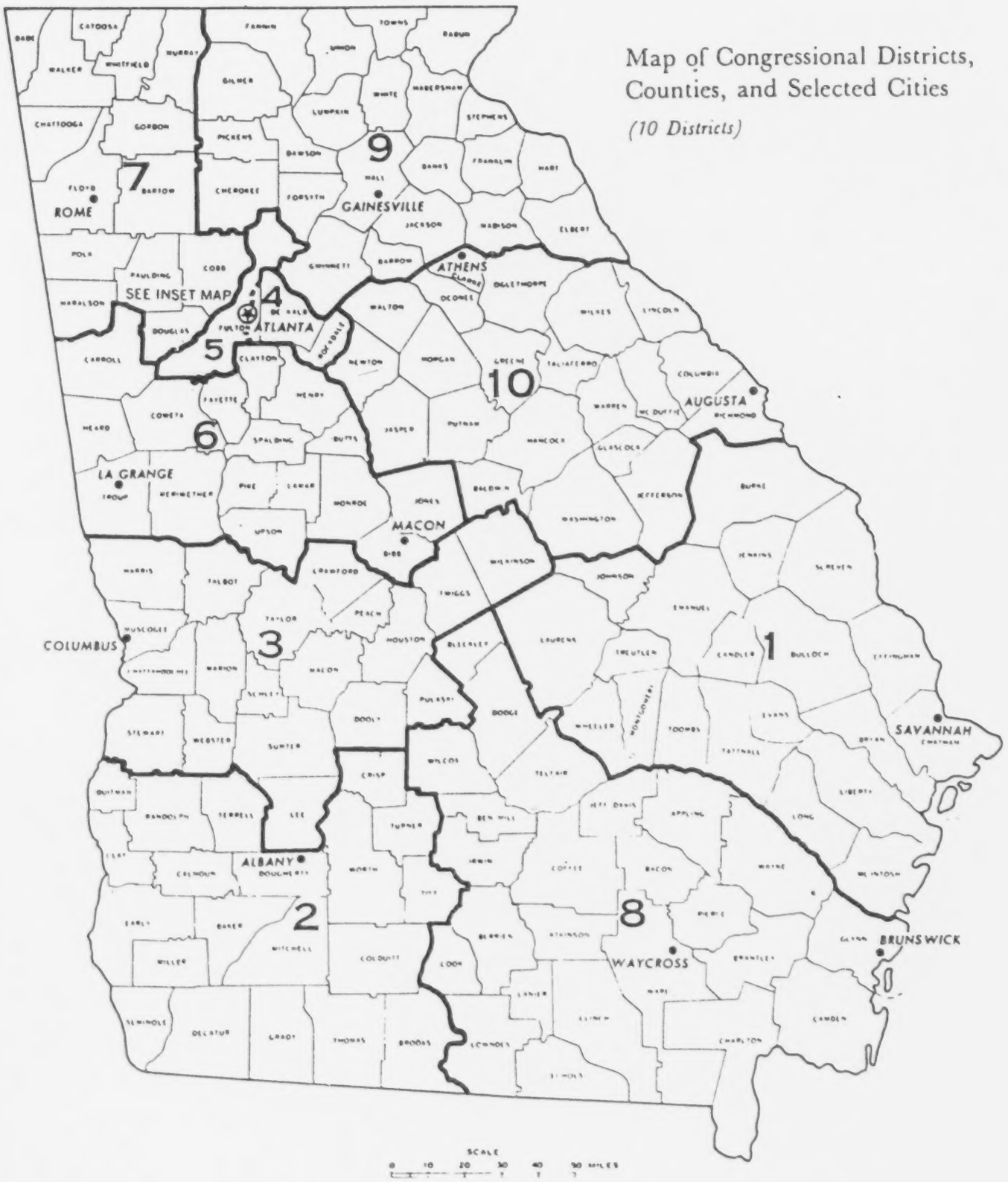
a.) be clearly depicted on census maps or on reapportionment work maps obtainable from the Reapportionment Office;

b.) be accompanied by a statistical sheet listing total population and minority population and a listing of the census geography making up each proposed district;

c.) stand as a complete plan for redistricting or, if presenting a partial plan, fit back into the committee's working plan (i.e., all pieces of geography must be accounted for in some district); and

d.) comply with the guidelines adopted by the committee.

3. Electronic submissions of legislative and Congressional redistricting plans will be accepted by the Reapportionment Committee. However, any plan submitted in a computer readable media should comply with the guidelines for electronic submission as adopted jointly by the U.S. Justice Department and the Reapportionment Task Force of the National Conference of State Legislatures. (See attachment A.)



Map of Congressional Districts, Counties, and Selected Cities

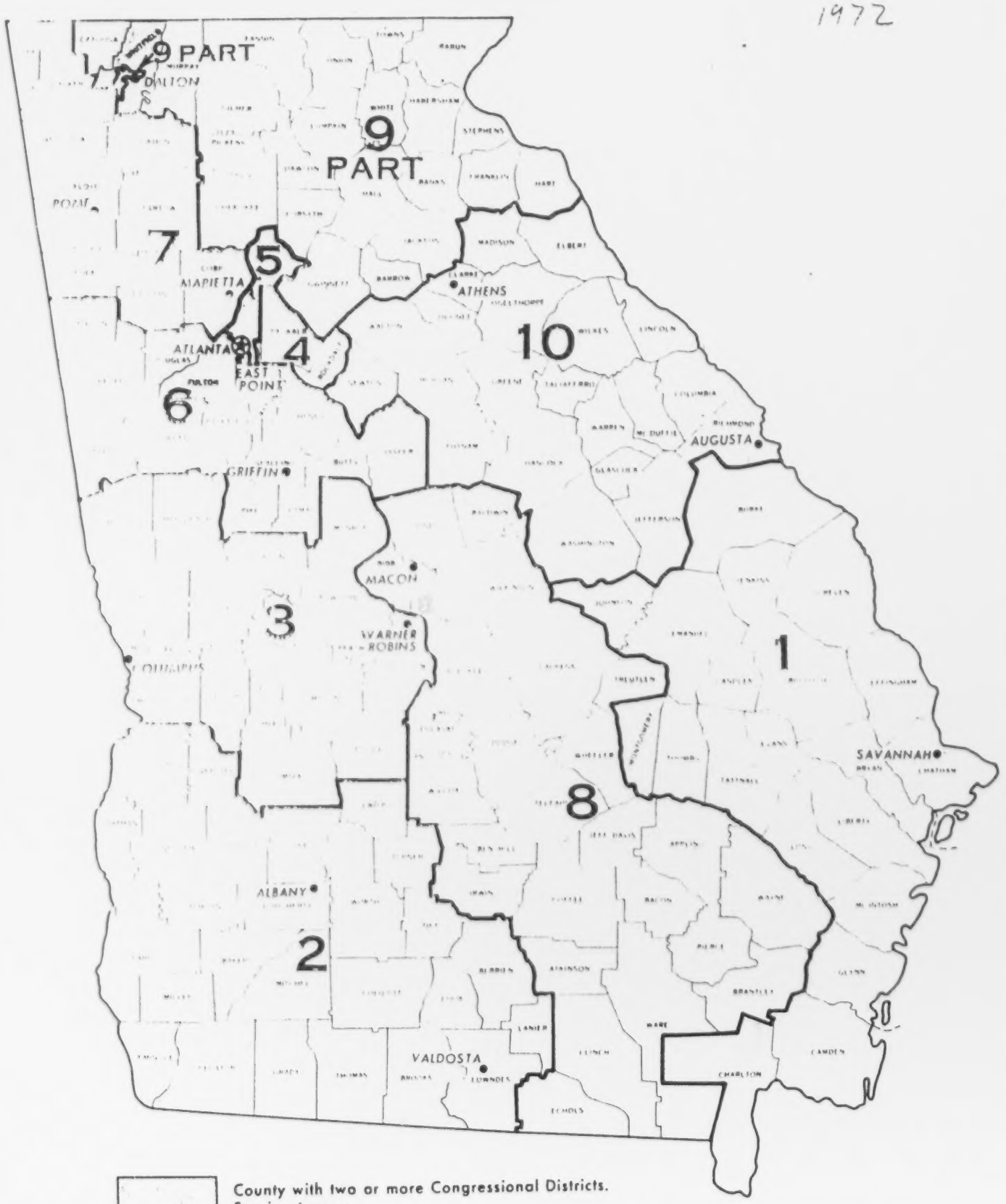
(10 Districts)

U.S. Department of Commerce
Bureau of the Census

Map of Congressional Districts, Counties, and Selected Cities

(10 Districts)

93.1 (census)
1972



U.S. DEPARTMENT OF COMMERCE
SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION
BUREAU OF THE CENSUS

Districts established March 16, 1972

GEORGIA

SENATORS

Sam Nunn
Wyche Fowler, Jr.

REPRESENTATIVES BY DISTRICTS

1. Lindsay Thomas
2. Charles F. Hatcher
3. Richard Ray
4. Ben Jones
5. John Lewis
6. *Newt Gingrich*
7. George (Buddy) Darden
8. J. Roy Rowland
9. Ed Jenkins
10. Doug Barnard, Jr.

76th Congress
HR

GEORGIA

(10 districts)

Defendants' Joint Exhibit 11

Client : LINDA
Plan : TEMPLATE
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly

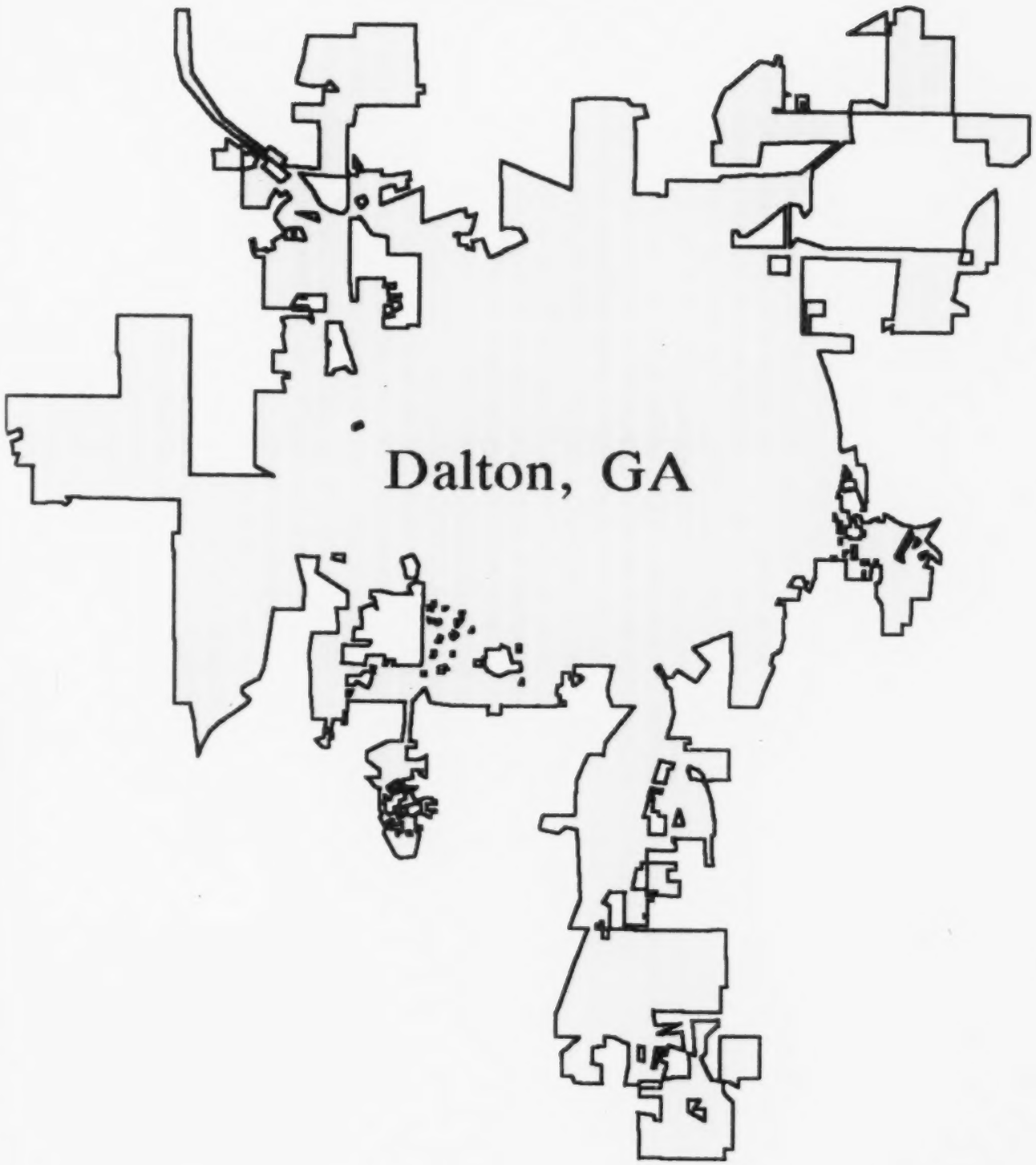
Population Summary Report
(NOTE: VAP – Voting Age Population)

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
4	589623	349022	421203	232203
	0.12	59.19	71.44	55.13
5	584675	365474	441678	253768
	-0.72	62.51	75.54	57.46
Totals	1174298	714496	862881	485971

Number of Districts	:	11
Members Per District	:	1
Ideal District Size	:	588929
Average Deviation (%)	:	0.42
Deviation Range (%)	:	-0.72 to 0.12
Overall Deviation (%)	:	0.84

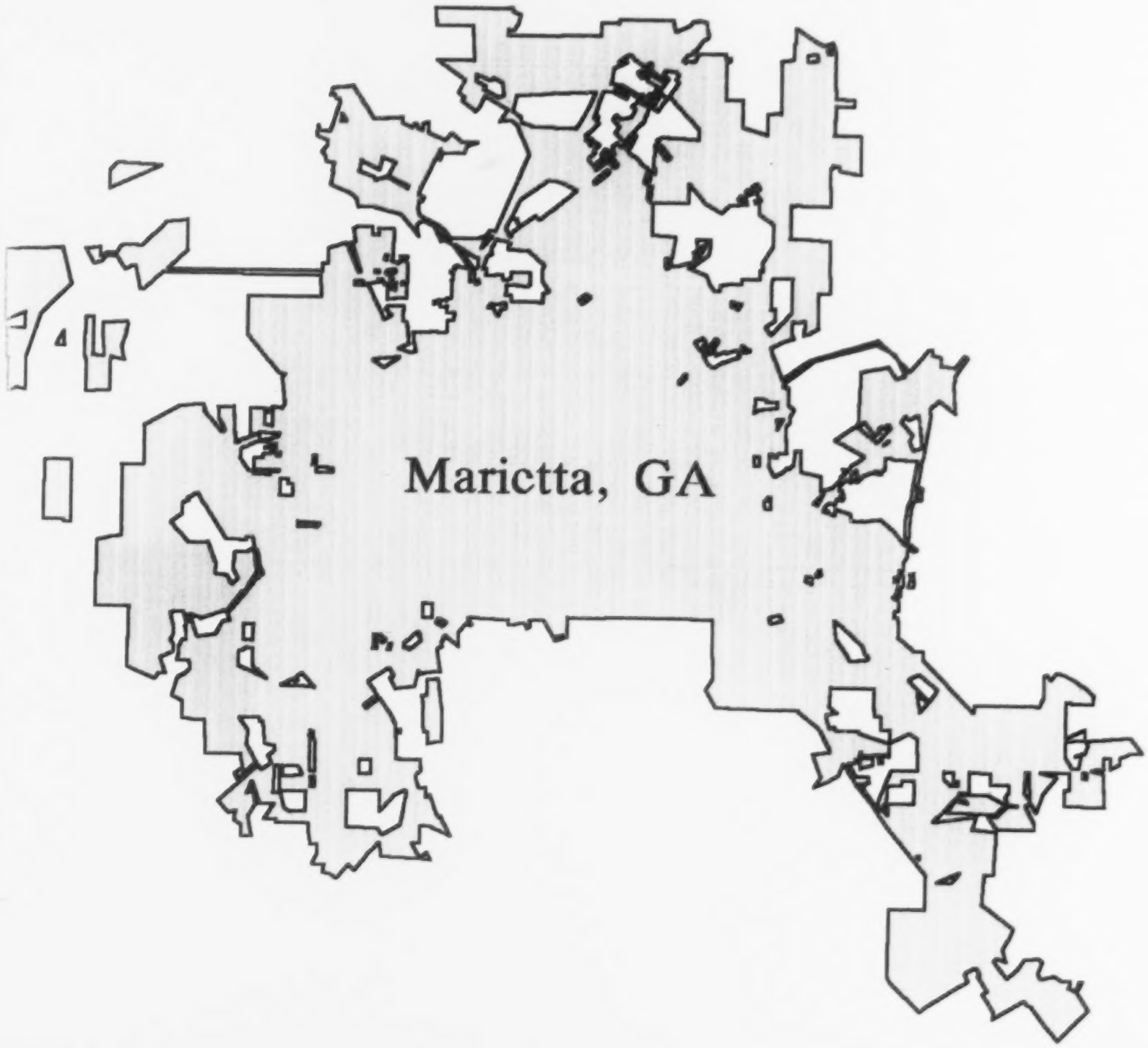
(DATA SOURCE: 1990 US Census
PL94-171 Population Counts)

Defendant's Exhibit 83



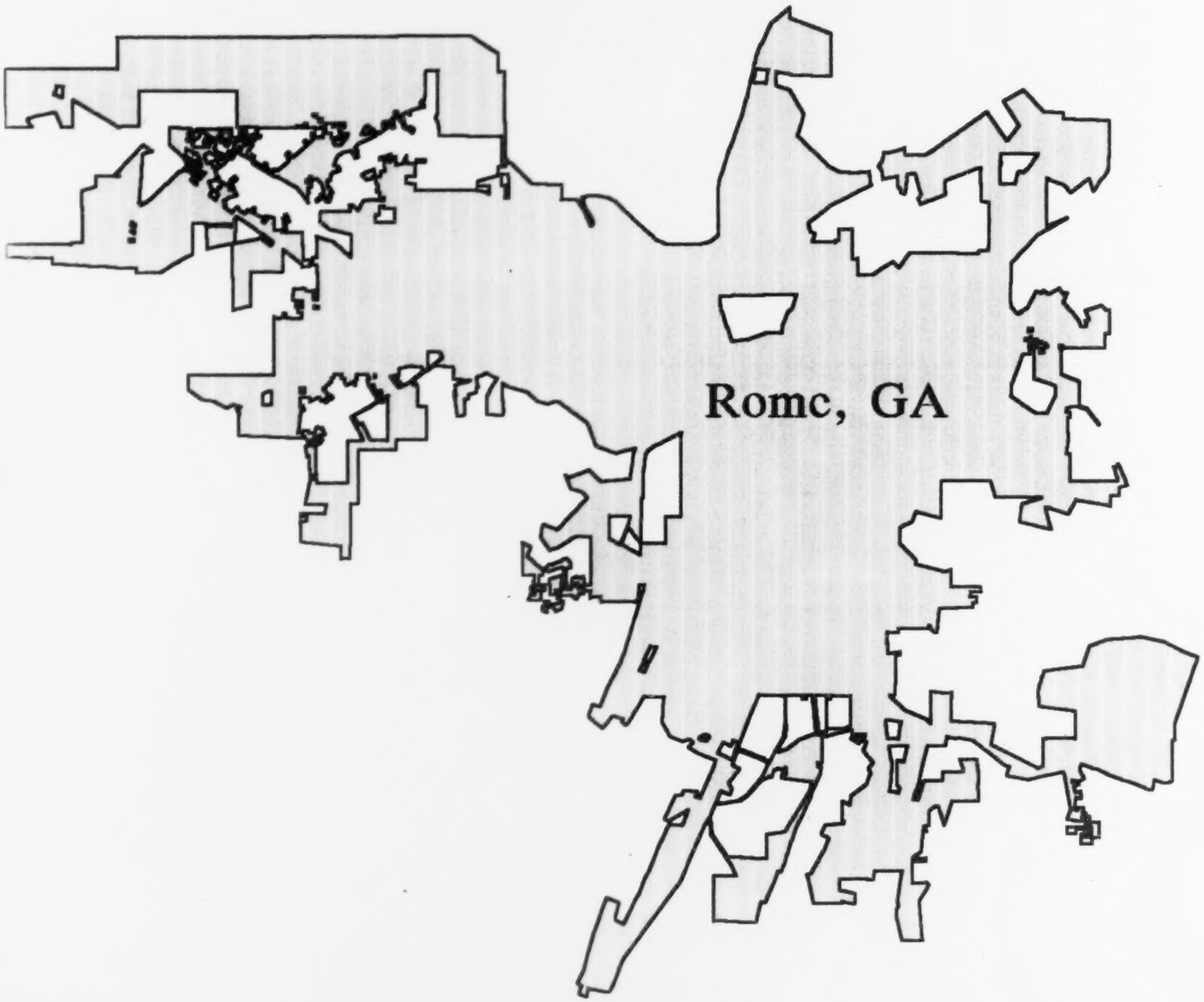
Defendant's Exhibit 87

Defendant's Exhibit 92

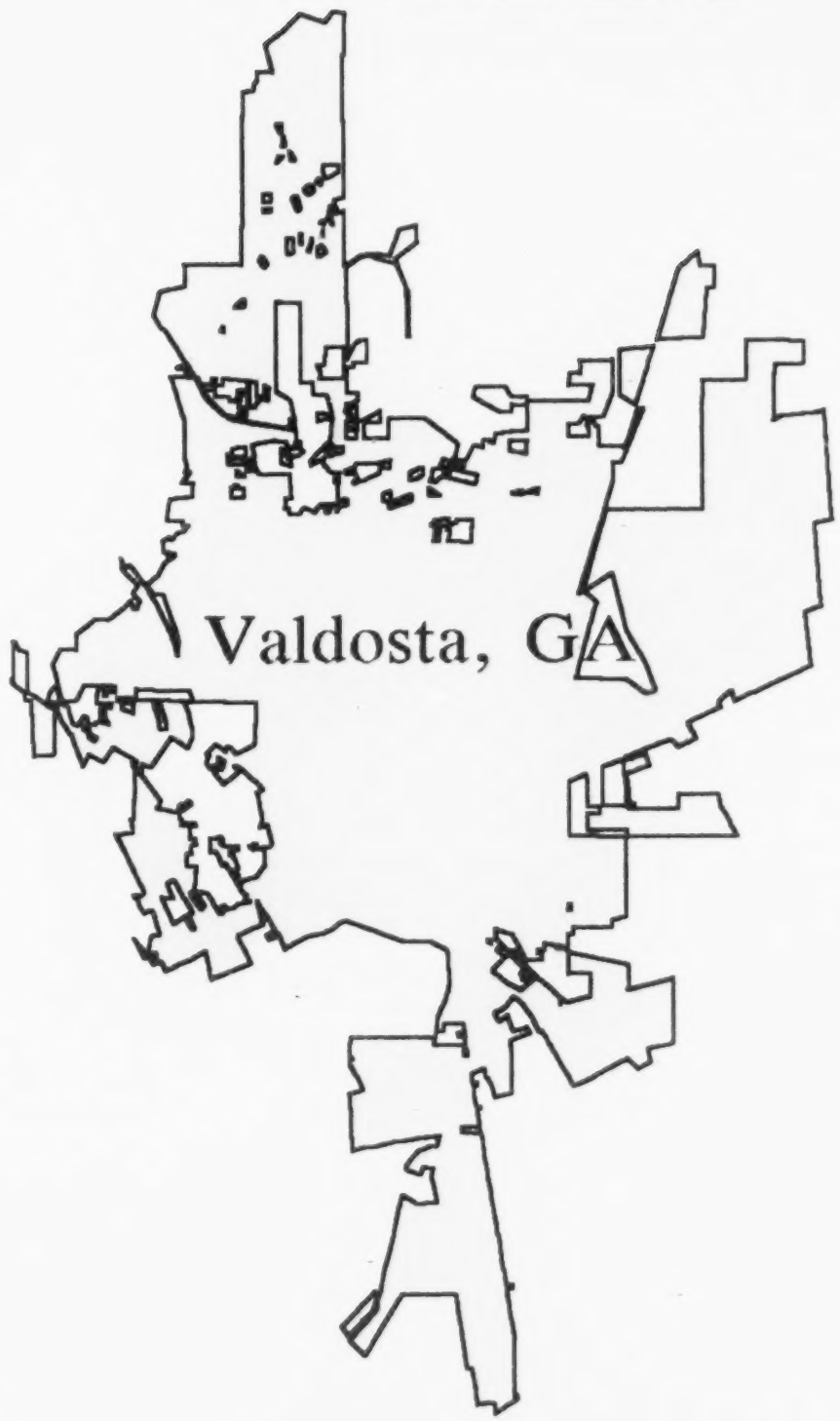


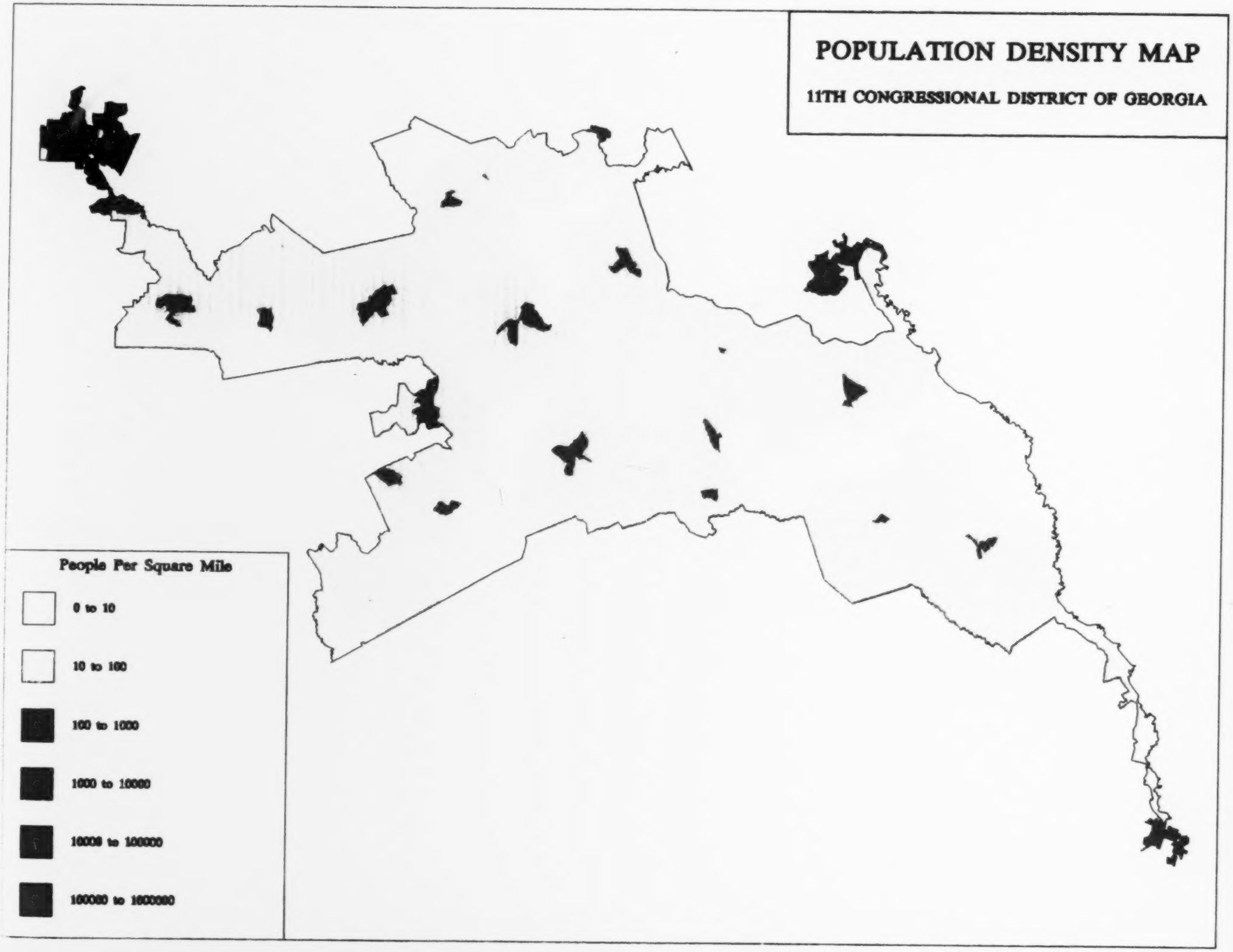
Defendant's Exhibit 93

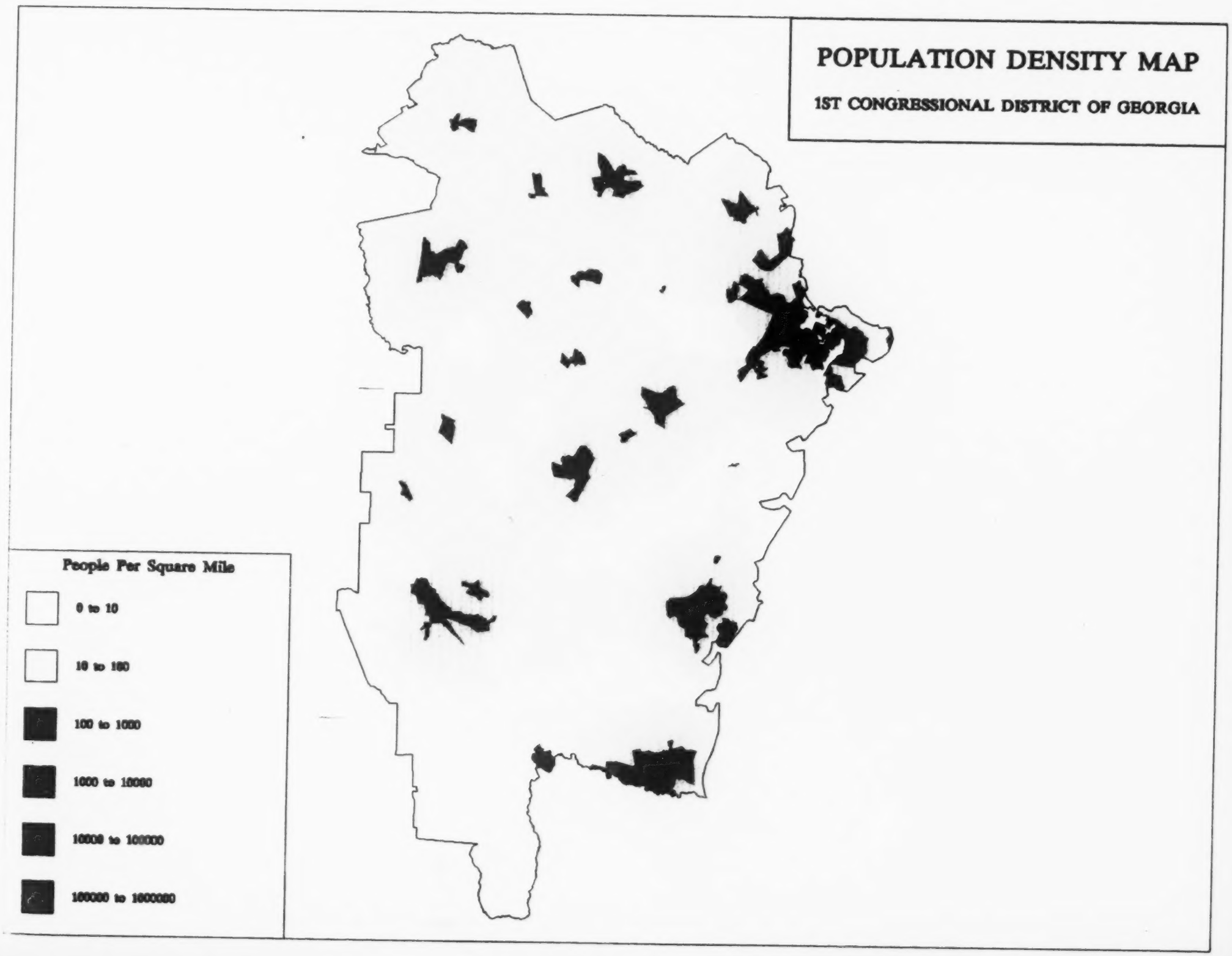
Defendant's Exhibit 95



Defendant's Exhibit 100




POPULATION DENSITY MAP
11TH CONGRESSIONAL DISTRICT OF GEORGIA
People Per Square Mile
0 to 10
10 to 100
100 to 1000
1000 to 10000
10000 to 100000
100000 to 1000000

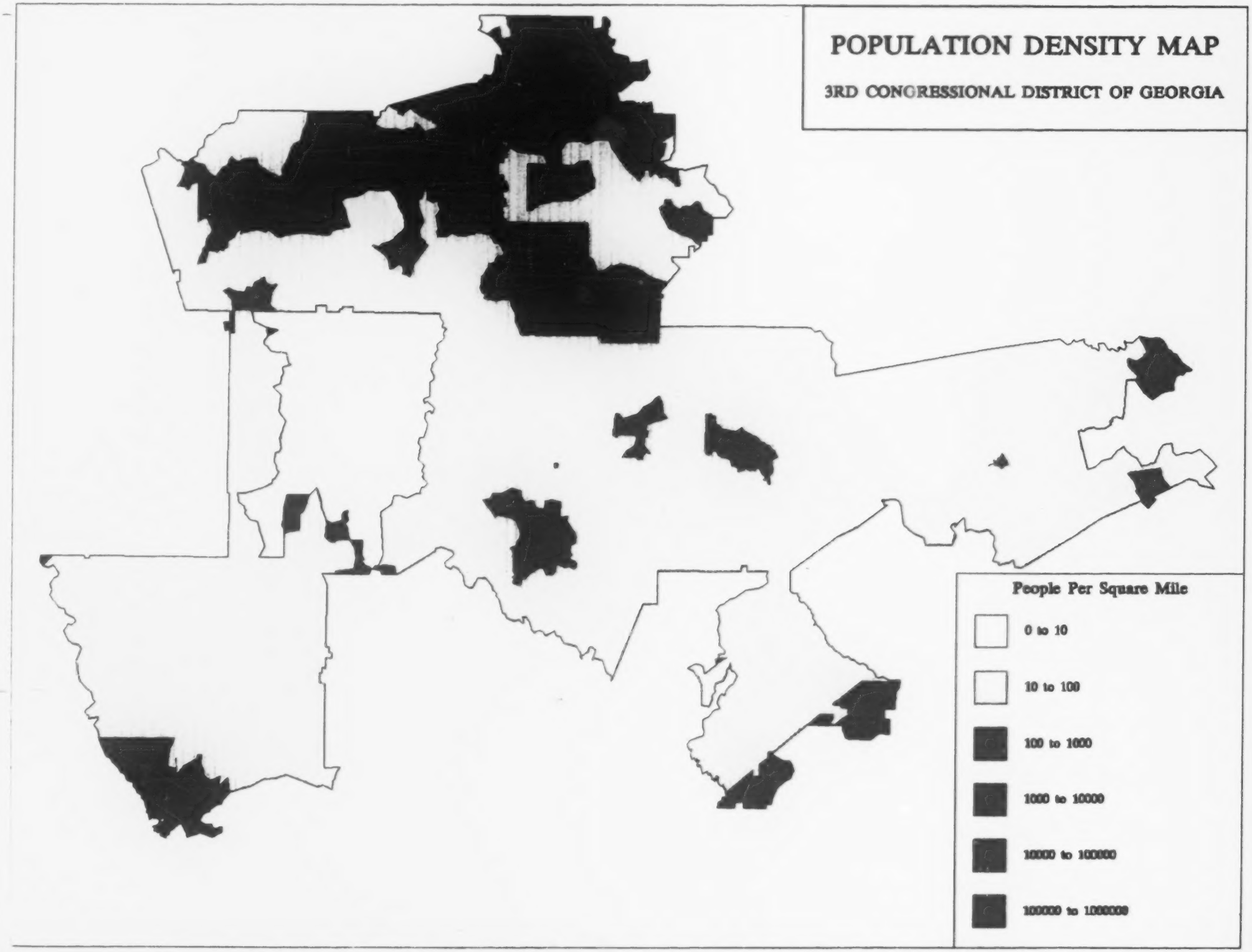

POPULATION DENSITY MAP
1ST CONGRESSIONAL DISTRICT OF GEORGIA
People Per Square Mile
0 to 10
10 to 100
100 to 1000
1000 to 10000
10000 to 100000
100000 to 1000000

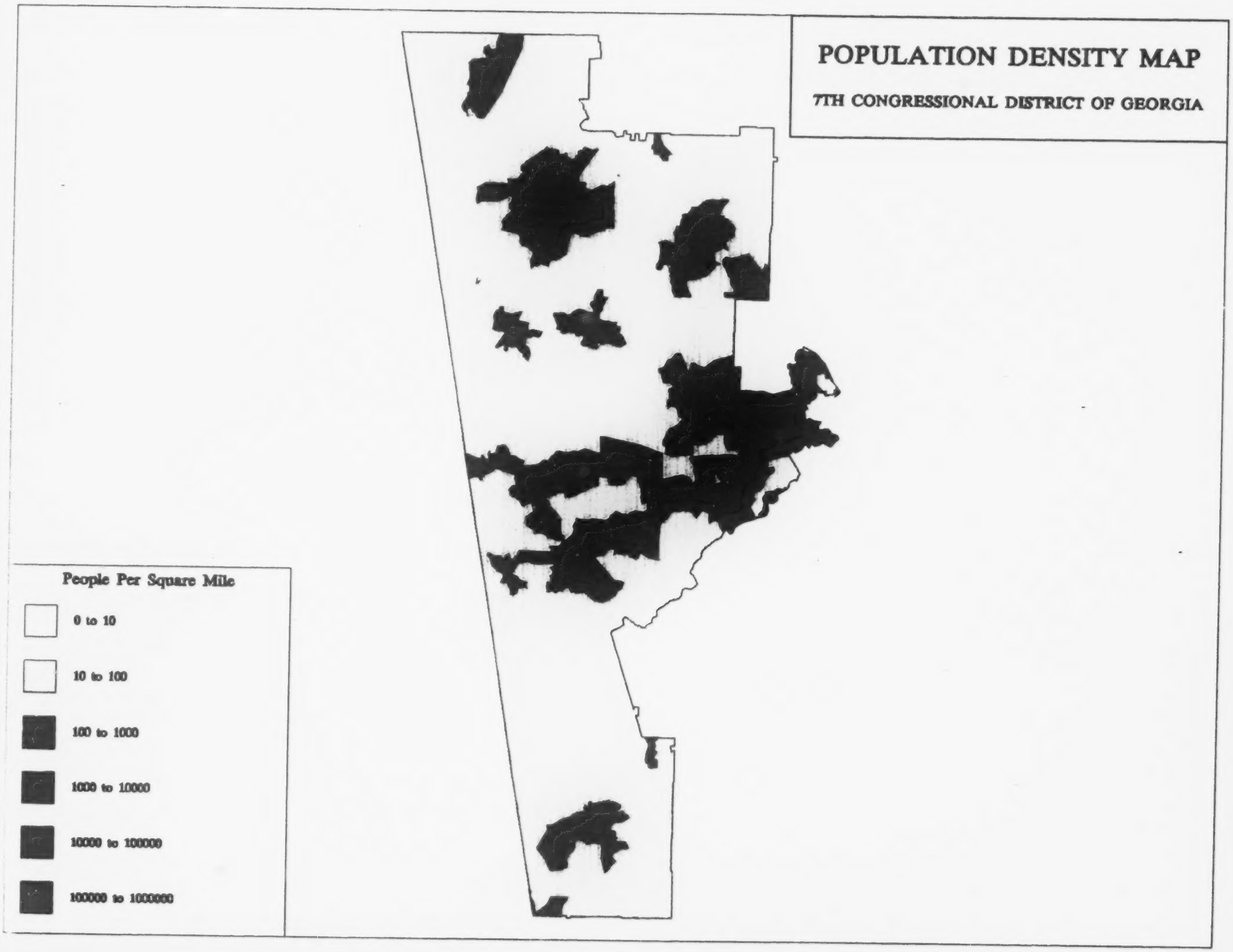
POPULATION DENSITY MAP

2ND CONGRESSIONAL DISTRICT OF GEORGIA

People Per Square Mile

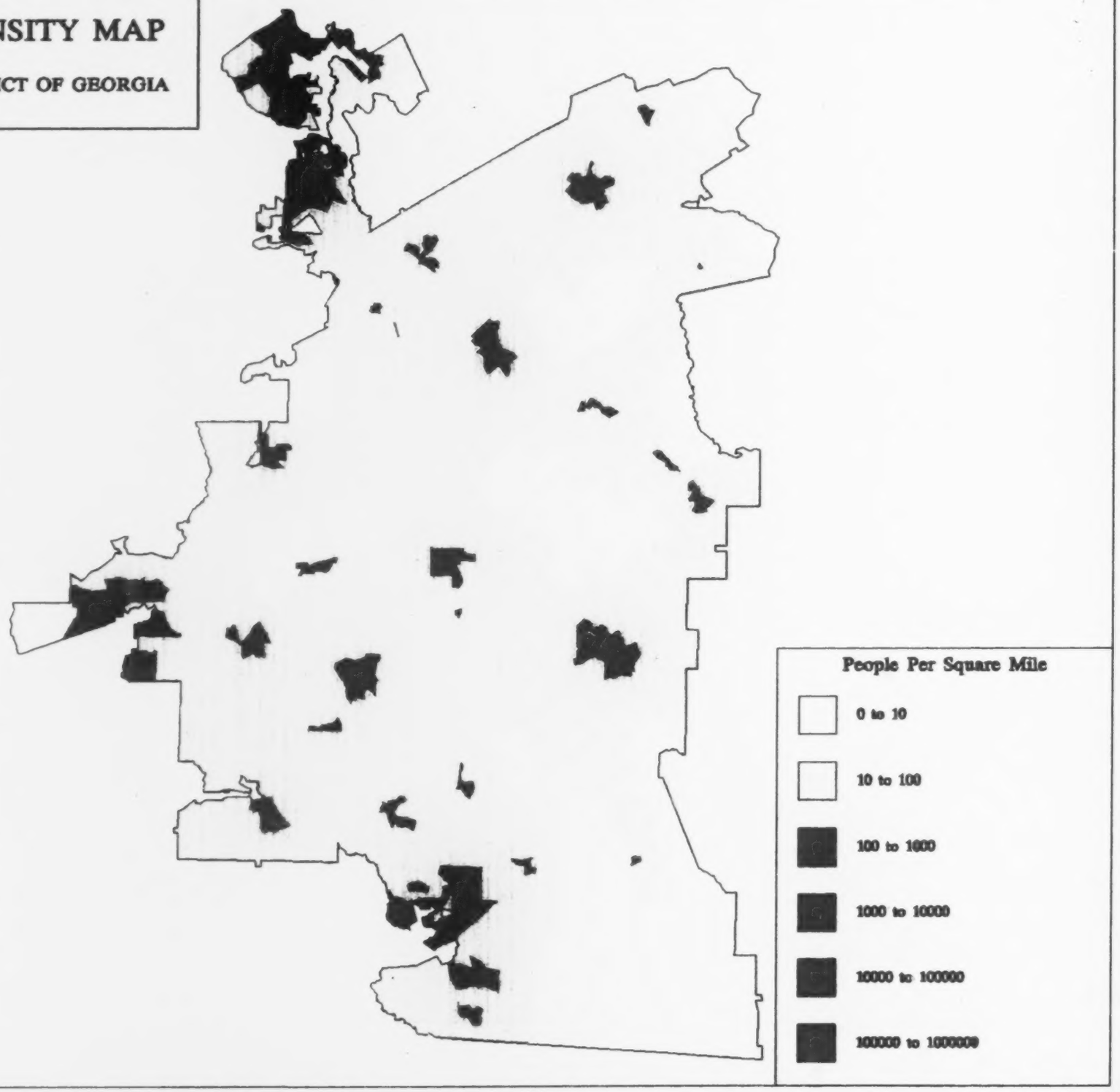
- 0 to 10
- 10 to 100
- 100 to 1000
- 1000 to 10000
- 10000 to 100000
- 100000 to 1000000


POPULATION DENSITY MAP
3RD CONGRESSIONAL DISTRICT OF GEORGIA
People Per Square Mile
0 to 10
10 to 100
100 to 1000
1000 to 10000
10000 to 100000
100000 to 1000000


POPULATION DENSITY MAP
7TH CONGRESSIONAL DISTRICT OF GEORGIA
People Per Square Mile
0 to 10
10 to 100
100 to 1000
1000 to 10000
10000 to 100000
100000 to 1000000

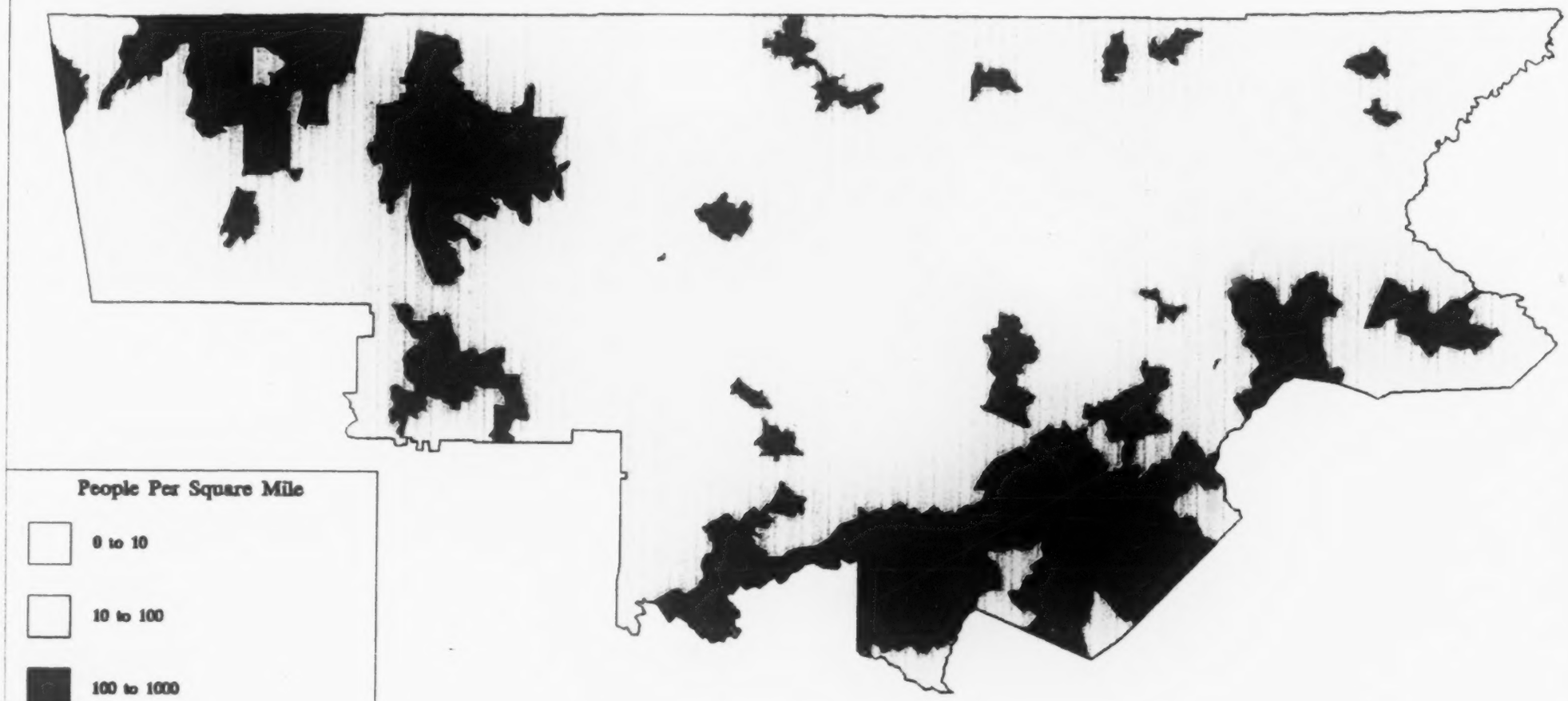
POPULATION DENSITY MAP

8TH CONGRESSIONAL DISTRICT OF GEORGIA



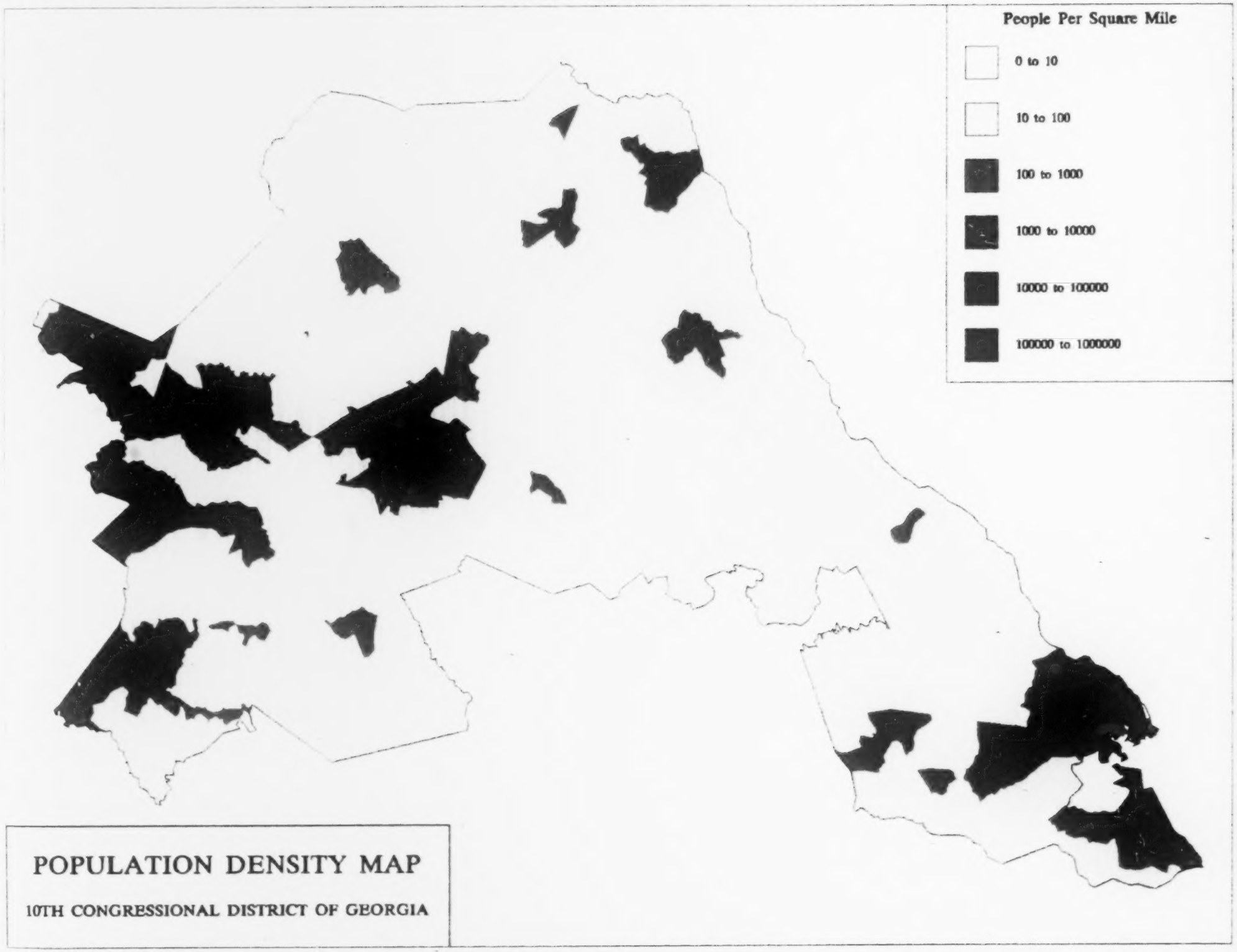
POPULATION DENSITY MAP

9TH CONGRESSIONAL DISTRICT OF GEORGIA



People Per Square Mile

- 0 to 10
- 10 to 100
- 100 to 1000
- 1000 to 10000
- 10000 to 100000
- 100000 to 1000000

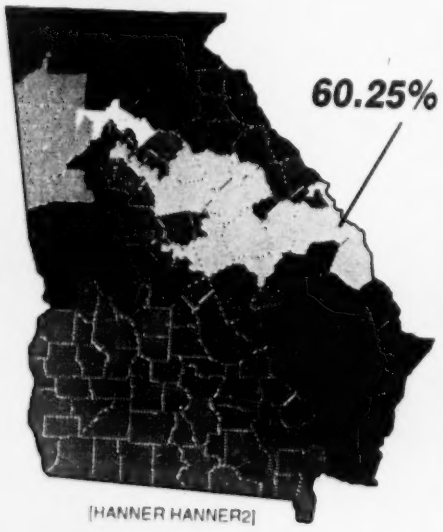
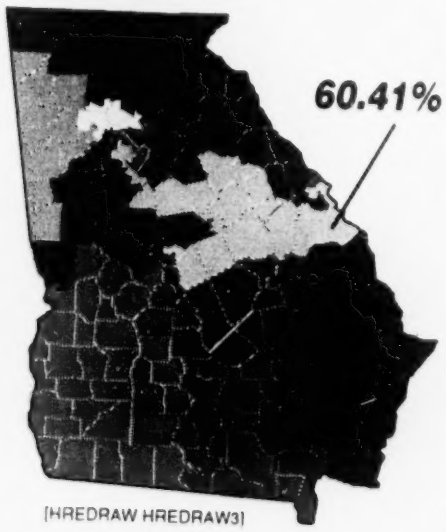
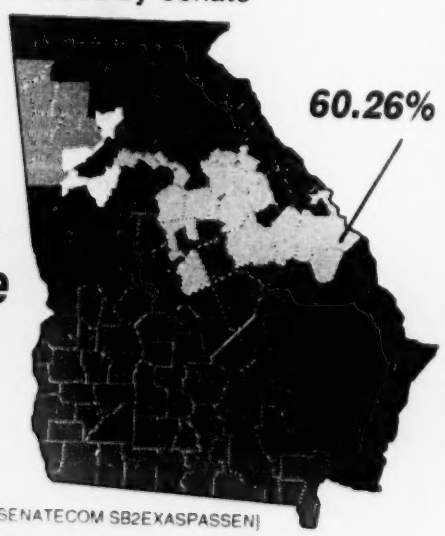
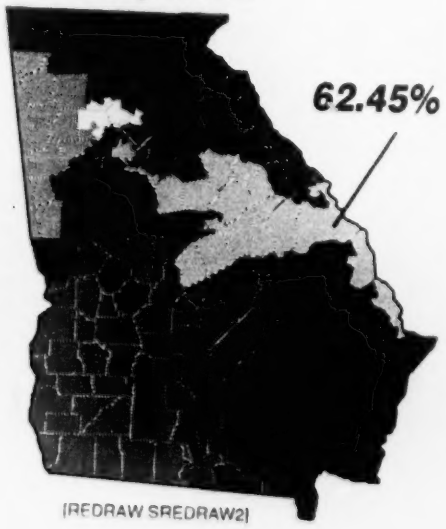
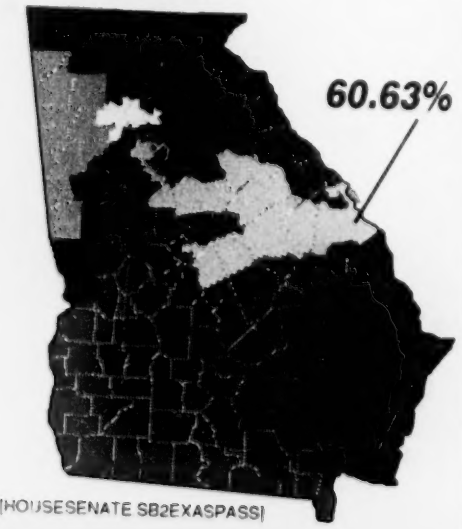
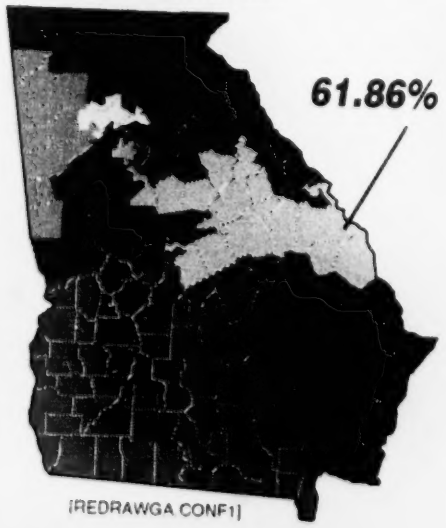
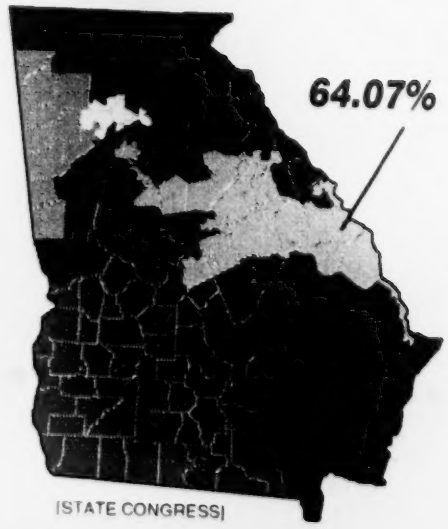


POPULATION DENSITY MAP

10TH CONGRESSIONAL DISTRICT OF GEORGIA

Plans Approved by Georgia House and Senate

(With Total Black Population Percentage in the 11th Congressional District)

	Round 1	Round 2	Round 3
House	Passed by House  60.25% [HANNER HANNER2]	Passed by House  60.41% [HREDRAW HREDRAW3]	
Senate	Passed by Senate  60.26% [SENATECOM SB2EXASPASSEN]	Passed by Senate  62.45% [REDRAW SREDRAW2]	
Final	First Submission  60.63% [HOUSESENATE SB2EXASPASS]	Second Submission  61.86% [REDRAWGA CONF1]	Precleared Plan  64.07% [STATE CONGRESS]

DEFENDANT'S EXHIBIT
DOJ 76
NO.

Plaintiff's Exhibit 2

[seal]

U.S. Department Justice

Civil Rights Division

Office of the Assistant Attorney General
Washington D.C. 20530

Jan. 21, 1992

Mark H. Cohen, Esq.
Senior Assistant Attorney General
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Cohen:

This refers to Act No. EX29 of the 1991 Extraordinary Session, which provides for the 1991 redistricting of House districts and a change in method of election from 130 single-member districts, 24 multimember districts and two floterial districts to 180 single-member districts; Act No. EX28 of the 1991 Extraordinary Session, which provides for the 1991 redistricting of the 56 Senate districts; and Act No. EX27 of the 1991 Extraordinary Session, which provides for the implementation of an increase from ten to 11 Congressional seats for the State of Georgia and the 1991 redistricting of the 11 Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Additional information necessary to complete our review of all three Acts was

requested on November 22, 1991; responses were received on November 29 and December 10 and 18, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. With regard to the change in the method of electing the House members from 130 single-member districts, 24 multimember districts and two floterial districts to 180 single-member districts, the Attorney General does not interpose any objection. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With regard to the statewide redistricting plans, we would note that, as it applies to the redistricting process, the Voting Rights Act requires the Attorney General to determine whether the submitting authority has sustained its burden of showing that the legislative choices made under a proposed plan are free of racially discriminatory purpose or retrogressive effect and whether the submitted plan will result in a clear violation of Section 2 of the Act. In the case of a statewide redistricting of the State of Georgia, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of the legislative choices that were made in arriving at the particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R.

51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan in which the state legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities. See, e.g., *Garza v. Los Angeles County*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Such concerns are frequently related to the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice or fragmenting minority concentrations which have a community of interest. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the statutory and demographic changes which compelled the particular jurisdiction's need to redistrict (*id.*). Finally, our entire review is guided by the principle that the Act insures fair election opportunities and does not require that any jurisdiction attempt to guarantee racial or ethnic proportional results.

We have reviewed the legislative choices made by the State of Georgia with regard to all three statewide plans in light of these principles. At the outset, we note that elections in the State of Georgia are characterized by a pattern of racially polarized voting which appears to be exacerbated by the requirement that state legislative and congressional positions be elected by a majority of the vote. In addition, a concern has been raised that throughout the legislative process, certain rules and procedures were adopted which discouraged alternative redistricting plans from being presented and debated. In fact, it was charged that the state often rushed the process in order to

manipulate the adoption of plans that minimize minority voting strength overall.

The House Plan

With respect to the House plan, it appears that in several areas discussed below, boundary lines logically could be drawn so as to recognize black population concentrations in a manner that would provide black voters more effectively with an opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to impact adversely on minority voting strength was the state's treatment of black concentrations to protect incumbents. Thus, the state's "work group" system and rules for the members of the House worked to benefit incumbents and minimize black voting strength.

In the southwest region involving proposed House District 159, and in the Peach and Houston Counties area, the proposed plan fails to recognize black population concentrations although reasonable alternative configurations of boundary lines would permit additional districts that would provide black voters the opportunity to elect candidates of their choice. While we have noted the state's assertion that the division of the black community in these areas into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the re-election of white incumbents.

In House District 178 and in the Clayton County area, involving proposed House District 93, the proposed

House plan appears to manipulate the configurations to limit the racial percentages and to protect the incumbents in these areas. Furthermore, alternative plans were available that provide for effective black majority districts and the state again fails to provide a nondiscriminatory reason for rejection of such alternatives.

In Chatham County and in the Glynn/McIntosh/Liberty Counties area, alternatives which avoided unnecessary retrogression and which recognized minority voting potential by drawing additional viable black majority districts were rejected in what appears to be an effort to accomodate incumbent legislators at the expense of black voters. Similarly, in drawing the proposed districts, the state fragmented the politically cohesive and active Burke County voters into three different House districts.

In the Muscogee region, in following the arbitrary and discriminatory work group lines in drawing five districts internally within Muscogee County, the state avoided serious consideration of alternative plans which create a third district in the Muscogee and Chattahoochee Counties area which would provide black voters with an equal opportunity to participate in the political process and elect a candidate of their choice to office.

Despite a significant population decline that would normally require a reduction from four House districts to three House districts in Dougherty County, the state stretches unnecessarily to retain four House districts based in this county. To accomplish this, the state projects a slender finger of predominately white District 164, which is comprised of all of Mitchell and part of Colquitt Counties, up into Dougherty County to include a small

number of Dougherty County residents. Concerns were raised that the state's choices of boundary lines in this area were a response to requests that lines be drawn to avoid control by black voters' representatives by contriving to maintain an equal number of white and black legislators on the Dougherty County legislative delegation. The state has not proffered a nonracial justification for this unusual configuration other than to say that this "finger" was drawn primarily due to specific requests.

The Senate Plan

The Senate plan likewise includes instances in which the concerns of the incumbents were placed ahead of black voting potential. In the DeKalb/Clayton Counties area (proposed District 44), the Twiggs/Wilkinson Counties area (proposed District 26), and the Fulton/Cobb Counties area (proposed Districts 33 and 38) it appears that protection of incumbents motivated the fragmentation of concentrations of black residents who clearly have a community of interest with the residents of the adjacent black majority district.

In the southwest portion of the state, as well as east-central Georgia, there are many majority black counties which have been divided between several majority white districts or drawn into a district such as proposed District 12 in which the black percentage of voters was minimized to protect the white incumbent. We note that there were available to the state alternatives which recognized the black voting potential in these areas by drawing three majority black districts in the southwest (in the area of proposed Districts 8, 11, 12, 14, and 15) and a second

majority black district in the east-central portion of the state (in the area of proposed Districts 4, 20, 22, 24, and 25).

We understand also that, late in the redistricting process, proposed Senate District 2 was altered by including several predominantly white, affluent, politically active precincts while excluding adjacent black concentrations. The state has not, to date, made a persuasive showing that these particular boundary choices are free of a discriminatory purpose and effect.

The Congressional Plan

With regard to the Congressional redistricting plan, we note that Georgia has gained one additional Congressional seat because of an increase in the state's population. A concern was raised with regard to the principle underlying the Congressional redistricting, namely that the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts. The proposed plan provides for districts which attempt to recognize, for the most part, black voting potential in the Fulton/DeKalb area and the east-central portions of the state but do not recognize the black voting potential of the large concentration of minorities in southwest Georgia. While Section 5 considerations certainly do not dictate that the state adopt any particular configuration, we note that several alternative redistricting approaches were suggested to the legislature during the process. Notwithstanding these alternatives, the state redistricting leadership did not make a good faith attempt to recognize the concentrations of black voters in

the southwest and has not yet been able to adequately explain the departure from its own stated criteria and what appears to be resulting minimization.

As to the proposed 11th Congressional district, we note that the exclusion of the minorities in adjacent Baldwin County from this majority black district not only limits the black percentage of the district but also ignores the community of interest which black residents of Baldwin County share with those in the surrounding counties. The state has indicated that this configuration resulted due to the extensive health care complex in Baldwin County. This reason, however, appears to be pretextual.

Similarly, with regard to the proposed 5th Congressional district, the state has not satisfactorily explained the reasons for including large portions of predominantly white precincts in Fayette County while excluding adjacent black concentrations (e.g., in Cobb County) which have a community of interest with the residents of the 5th district. This is of particular concern considering the retrogressive impact these proposed boundary lines have on black voters' opportunity for representation on the Department of Transportation board.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting plans for Georgia State House, Senate and Congressional districts to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistricting plans for Georgia House, Senate and Congressional districts continue to be legally unenforceable. *Clark v. Roemer,* 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Georgia plans to take concerning these matters. If you have any questions, you should call Sandra Coleman (202-307-3718), Deputy Chief of the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

Plaintiff's Exhibit 3A

The Department of Law
State of Georgia
Atlanta
30334

[SEAL]
MICHAEL J. BOWERS
ATTORNEY GENERAL

132 STATE JUDICIAL BUILDING
TELEPHONE
(404) 656-3300
FAX (404) 651-9148

BY FEDERAL EXPRESS

March 3, 1992

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT EXPEDITED HANDLING REQUESTED

Mr. Gerald W. Jones
Chief, Voting Section
Civil Rights Division
United States Department of Justice
320 First Street, N.W.
Room 716
Washington, D.C. 20035-6128

RE: Reapportionment of Congressional Districts for the State of Georgia; Submission of Act No. 638, pursuant to the Voting Rights Act of 1965, as amended; Your File Nos. 91-3556, 91-3557, and 91-3558.

Dear Mr. Jones:

Pursuant to the objections to Act No. EX27 of the 1991 Extraordinary Session of the Georgia General Assembly interposed on behalf of the United States Attorney General by Mr. John R. Dunne by letter dated January 21, 1992, please find enclosed as *Exhibit C-1* a certified copy of Act No. 638 of the 1992 Regular Session of the Georgia

General Assembly for Preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. As shown below, the State of Georgia asserts that the changes to Georgia's Congressional reapportionment plan contained in Act No. 638 are in response to the Attorney General's objections and comply with the Voting Rights Act in that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race.

The differences between Act No. 638 and Act No EX27 are fully explained below. The changes were made for one of two reasons: (1) a direct response to the specific objections made by the Justice Department in its January 21, 1992, objection letter; and (2) the "ripple" effect to neighboring districts caused by those adjustments made in response to the Justice Department's objections.

Initially, as previously stated in our re-submissions of Georgia's House and Senate reapportionment plans on February 20, 1992, we respectfully urge that you give the most expedited consideration to this submission, since the qualification for candidates for the Georgia State House begins on April 27, 1992. In addition, the Georgia General Assembly currently is in session, so that if there are any further objections to the House Plan, we would urge that they be transmitted to us within the next several weeks in order for the General Assembly to consider such objections during its Regular Session. Finally, a lawsuit has been filed by two plaintiffs from Cobb County asking a three-judge federal court in Atlanta to postpone the qualifying and primary dates in the event the Justice Department does not approve Georgia's reapportionment plans, and, if necessary, to establish new districts. *Jones v.*

Miller, U.S.D.C., N.D.Ga., Civil Action No. 1:92-CV-330-JOF. United States District Judge J. Owen Forrester has scheduled a hearing for April 1, 1992, and has indicated he may assume jurisdiction of this matter in the event any of the plans are not approved by the Justice Department by that date.

We also are including the following additional exhibits in support of Act No. 638:

Exhibit C-2 – Duplicate statewide (Exhibit C-2.1) and metro Atlanta (Exhibit C-2.2) maps of the new Georgia Congressional redistricting plan embodied in Act No. 638.

Exhibit C-3 – Statistics showing total and voting age population by race for each proposed Congressional District in Act No. 638 (Exhibit C-3.1) and election statistics for 1988-1990 General Elections, 1990 Democratic runoff primary, and 1988 Democratic Presidential Preference Primary divided into proposed Congressional districts (Exhibit C-3.2).

Exhibit C-4 – Transcripts of the Senate and House Reapportionment Committee Meetings subsequent to the Justice Department's January 21, 1992, letter of objection, as follows:

Exhibit C-4.1 – February 17, 1992 meeting of the Senate Reapportionment Committee

Exhibit C-4.2 – February 18, 1992 meeting of the Senate Reapportionment Committee

Exhibit C-4.3 – February 18, 1992 meeting of the House Reapportionment Committee

Exhibit C-4.4 – February 19, 1992 meeting of the House Reapportionment Committee

Exhibit C-5 – Alternative maps in duplicate presented to and the plan adopted by the Senate Reapportionment Committee subsequent to the Justice Department's January 21, 1992, letter of objection.

Exhibit C-6 – Alternative maps in duplicate presented to and the plan adopted by the House Reapportionment Committee subsequent to the Justice Department's January 21, 1992, letter of objection.

Exhibit C-7 – Amendments presented on the floor of the Georgia Senate.

Exhibit C-8 – Amendments presented on the floor of the Georgia House.

Exhibit C-9 – Map considered by the House and Senate Conference Committee on Congressional reapportionment, and adopted as Act No. 638 (same map as Exhibit C-2).

Exhibit C-10 – videotape of the floor debate of the Georgia State Senate and Georgia House on the proposed Congressional plan and the discussions of the Conference Committee.

Exhibit C-11 – Computer disk containing the revised Congressional reapportionment plans.

Exhibit C-12 – Newspaper clippings regarding Congressional reapportionment subsequent to the Justice Department's January 21, 1992, letter of objection (*see also* Exhibit S-10 of Senate Plan submission of February 20. 1992).

SUMMARY OF CHANGES TO THE CONGRESSIONAL PLAN

Mr. Dunne's January 21, 1992, letter of objection raised three areas where the Justice Department concluded that the State of Georgia had failed to meet its burden of showing that the proposed redistricting plan contained in Act No. EX27 did not have the prohibited purpose or effect of diluting minority voting strength under Section 5. Act No. 638 responds to the Attorney General's January 21, 1992, objections as follows:

The 5th Congressional District

With respect to the 5th Congressional District, the only current black majority Congressional district in the State of Georgia, Mr. Dunne indicated as follows:

> . . . the state has not satisfactorily explained the reasons for including large portions of predominently white precincts in Fayette County while excluding adjacent black concentrations (e.g., in Cobb County) which have a community of interest with the residents of the 5th district. This is of particular concern considering the retrogressive impact these proposed boundary lines have on black voters' opportunity for representation on the Department of Transportation board.

In response to this objection, Act No. 638 removes all of Fayette County from the 5th District and adds the two adjacent black precincts (Howells 1 and 2) in Cobb County. The precincts added in Cobb County are the same ones that were used in drawing Senate District 38. It should be noted that the only four precincts and a small portion of a fifth precinct in Clayton County included in

the 5th Congressional District are majority black precincts, ones that were included in the plan previously submitted to the Justice Department and not objected to. The result of this change, compared to the previous plan contained in Act No. EX27, is shown below:

District No.	Total Pop. % Deviation	Black Pop. % of Total	VAP % of total	Black VAP % of total
5 (old)	591871	367747	440208	254608
	0.50	62.13	74.38	57.84
5 (new)	586485	365206	440910	253413
	-0.41	62.27	75.18	57.47

It should also be noted that the changes mandated by the Justice Department letter do not result in any retrogressive impact on the ability of black senators and representatives to elect a member of their choice to the Board of the Department of Transportation. In fact, a comparison between the existing Congressional plan, the plan contained in Act No. EX27 that was rejected by the Justice Department, and the plan contained in Act No. 638 shows that none of the proposed plans result in any retrogressive effect in the ability of minority members of the House and Senate to influence the election of the members of the Board of Transportation from the 5th Congressional District:

Congressional Plan	# of House/ Senate Black Districts	# of House/ Senate White Districts
1981 Plan	18*	14
Act No. 27EX	18	12
Act No. 638	18	12

*excludes two "at-large" districts, which no longer exist in current House Plan

See also Exhibit C-4.2, pp. 7-9. Clearly, the changes made to the 5th Congressional District under Act No. 638 comply completely with the Justice Department's previous letter of objection, in that: (1) no portion of Fayette County remains in the 5th District, (2) the adjacent black precincts in Cobb County are included in the 5th District, (3) only black precincts in Clayton County remain in the 5th District, and (4) the configuration of the 5th District has no retrogressive impact on the ability of black voters to elect a candidate of their choice to the Board of Transportation in that district. Therefore, we respectfully urge that the changes to the 5th Congressional District be approved.

The 11th Congressional District

The only objection raised with respect to the 11th Congressional District, which was drawn in Act No. EX27 as Georgia's new and second minority district, was "the exclusion of minorities in adjacent Baldwin County from this majority black district." In response to this objection, Act No. 638 adds to the 11th Congressional District all those heavy black concentrations of voters from Baldwin County. The effect of this change results in the following comparison between the rejected and new proposed plans:

District No.	Total Pop. % Deviation	Black Pop. % of Total	VAP % of total	Black VAP % of total
11 (old)	583500	353769	415339	235112
	-0.92	60.63	71.18	56.61
11 (new)	588218	363894	417681	242110
	-0.12	61.86	71.01	57.97

Once again, this alteration was done expressly to meet the Justice Department objection, and we ask that it be expeditiously approved.

III. The 2nd Congressional District

The final area of objection in the January 21, 1992 letter centers on the percentage of minorities in the 2nd Congressional District. Under Act No. EX27, the 2nd Congressional District had a black population of 39.47% and a black voting age population of 35.37%. The objection letter indicates that the State of Georgia did not satisfactorily explain the rejection of other alternative configurations for this district and that "the state redistricting leadership did not make good faith attempt to recognize the concentrations of black voters in the southwest."

While we would dispute any allegation that there was any purposeful effort to dilute minority voting strength in the drawing of the congressional districts in the 1991 Special Session, the objection of the Justice Department has resulted in the General Assembly once again looking at the southwest Georgia area to determine whether a viable black majority Congressional district could be drawn, or if not, whether the percentage of black voters in the 2nd district could be significantly increased so as to

enhance the ability of minorities to influence the election of a member of Congress from that region.

There were several proposals for a reconfiguration of the 2nd district considered. The General Assembly was faced with two basic options. One was to enhance the percentage of minorities in the 2nd Congressional District while maintaining the viability of both the 5th and 11th Congressional Districts as effective black majority districts. Another option was to attempt to create a more influential black southwest district on paper at the expense of placing the viability of the 11th District in serious jeopardy. The General Assembly chose the former option.

The 2nd District as contained in Act No. 638 has a significantly higher percentage of black population and voting age population than that drawn in Act No. EX27, as shown below:

District No.	Total Pop. % Deviation	Black Pop. % of Total	VAP % of total	Black VAP % of total
2 (old)	587346	231843	415158	146861
	-0.27	39.47	70.68	35.37
2 (new)	583230	286629	409358	184258
	-0.97	49.15	70.19	45.01

It should also be noted that with the Fort Benning population removed, the 2nd District becomes a 50% black population district. The 2nd District as proposed recognizes the concentrations of black population in southwest Georgia without adversely affecting the 11th District. Indeed, any county which can reasonably be deemed to be included in southwest Georgia with a black population of over 40% was placed within the 2nd Congressional

District in whole or in part (to pick up only the black concentrations). While significant numbers of blacks from Muscogee, Crawford, Peach, Dooly, Dougherty, and Lowndes Counties were included, those concentrations of white population in Dougherty and Lowndes Counties were removed.

It is noteworthy that the only proposals presented which configured the 2nd District so as to achieve a percentage of black population *and* voting age population in excess of 50% took the 2nd District into Bibb County. This had the impact of substantially reducing the percentage of black population in the 11th District, thereby threatening the viability of that second majority black district without making the 2nd District substantially more viable. When the 2nd District is drawn to include the black population concentrations in Bibb County, the 11th District must be reconfigured to extend all the way into Chatham County in order to attempt to maintain the black concentrations in that district.

The reason the General Assembly chose not to adopt a configuration for the 2nd District which would have altered the 11th District in this fashion is two-fold. First, if the 11th District extends from the Atlanta area in DeKalb County into the metropolitan areas of Richmond, Bibb, *and* Chatham Counties, a candidate to be successful will have to run in four major media markets in Georgia. This would likely present a significant problem for any minority candidate in the 11th District, as recognized even by the proponents of the "Brooks-McKinney" plan. *See* Exhibit C-4.3, pp. 14-16. Consequently, increasing the minority population from 50% to 52-58% in the 2nd District would endanger what would otherwise be a viable

second minority black district already established by the General Assembly in the August, 1991, special session and recognized with approval by the Justice Department.

Second, it is clear that even if the population percentage is increased several more points in the 2nd District from that contained in Act No. 638, the 2nd District will still be no more than an influence district for minority voters. Black voter registration in this area has been historically low, so that the 2nd District, in any rational configuration, would not be a viable black majority district regardless of whether the black population percentage is 50% or approaches the mid-50% range. Any purported further "maximization" of the 2nd District would undoubtedly jeopardize the viability of the 11th District, so that the State of Georgia would, under such a scenario, have but one effective minority district. The alternative configurations for the 2nd District which extend into Bibb County and extend the 11th District into Chatham County therefore would result in the dilution of minority voting strength in Congressional elections. In addition, the extension of the 2nd District into Bibb County and the corresponding extension of the 11th District into Chatham County, with all of the necessary attendant changes, violate all reasonable standards of compactness and contiguity.

Given these considerations, which were debated throughout the session, the General Assembly chose to significantly increase the percentage of black population in the 2nd District from 39% in the former plan to 49.15% (actually, 50% when the military population is excluded) in Act No. 638. The voting age population in this District has been increased from 35% in the former plan to 45% in Act No 638 (again, excluding the military population,

46%). In accordance with the Justice Department's objection, this reconfiguration is "a good faith attempt to recognize the concentrations of black voters in the southwest" while, at the same time, consciously insures the continued viability of the 11th Congressional District as an effective majority minority district.

CONCLUSION

Accordingly, for the above reasons, we urge that Act No. 638 be approved by the United States Attorney General pursuant to Section 5 of the voting Rights Act of 1965, as amended. The redrawn Congressional plan satisfies all three objections of the Justice Department to Act No. EX27, enhances minority voting strength, and does not cause a potential dilution of the ability of black voters to elect a candidate of their choice.

Sincerely,

/s/ Michael J. Bowers
MICHAEL J. BOWERS
Attorney General

MJB:mhc
Enclosures

cc: Honorable Zell Miller
Honorable Pierre Howard
Honorable Thomas B. Murphy
Honorable Eugene P. Walker
Honorable Bob Hanner
Honorable Max Cleland
Mr. Sewell R. Brumby
Ms. Linda Meggars

Plaintiff's Exhibit 4

[seal] U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20035

March 20, 1992

Mark H. Cohen, Esq.
Senior Assistant Attorney General
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Cohen:

This refers to Act No. 616 of the 1992 Regular Session, which provides for the 1992 redistricting of House districts; and Act No. 615 of the 1992 Regular Session, which provides for the 1992 redistricting of Senate districts; submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on February 21, 1992; supplemental information was received on February 26, 27 and March 3, 4, 13, 17, 1992.

This also refers to Act No. 638 of the 1992 Regular Session, which provides for the 1992 implementation of an increase from ten to 11 Congressional seats for the State of Georgia with the 1992 redistricting of the Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on March 4, 1992; supplemental information was received on March 13, 17, 1992.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. As you are aware, on January 21, 1992, the Attorney General interposed an objection to several areas of each of the House, Senate, and Congressional plans that the state had submitted for Section 5 review. In analyzing the instant remedial plans, we are mindful of our bases for interposing the original objections in an effort to determine whether the state has overcome such concerns. In addition, we also have an obligation to investigate and analyze the motivations of the state legislature with regard to the second round of redistrictings. It is in that light that we have determined that in a number of areas of the state, the legislature has remedied our objections. However, the following explanation is meant to provide guidance to the state with regard to those areas in all three submitted plans that continue to be a problem under Section 5.

The House Plan

In response to our objection to the failure of the state to recognize black population concentrations in the Peach/Houston area, the state submitted proposed District 140, referred to as the "Heart of Georgia" district. While the state maintains that this district is the "first viable rural Georgia minority House district in the modern history of the General Assembly," the fact is that the adopted plan continues to fragment and submerge significant black population concentrations. The state chose to draw the "Heart of Georgia" district into Peach County and divided the Houston County black voters among

three majority white districts. Consequently, the proposed plan minimizes overall black voting strength in the heart of Georgia in an effort to protect an incumbent legislator. The state fails to articulate a legitimate nonracial reason for rejecting alternative plans which remedy the fragmentation and provide two viable black voting age majority districts in this area.

In the proposed House plan for the rural southwest region, we originally found that black concentrations were fragmented to ensure the re-election of white incumbents and that an additional black district could have been drawn. In response to our objection, the state simply moved black population into District 159 at the expense of the black population of proposed District 158. We are aware that there were alternative plans presented to the legislature that remedy this fragmentation and which provide two black voting age majority districts in this area. Similarly, in the Muscogee/Chattahoochee area, the state failed to remedy our concern that three viable black voting age majority districts were not drawn in this area due to inappropriate incumbency considerations.

In the Richmond/Burke Counties area, while the state appears to have cured our earlier objection to the fragmentation of minorities in Burke County, the state inexplicably includes a land bridge through Richmond County which connects Jefferson County with Columbia County (proposed District 120). Concerns were raised that the state's configuration in this area was designed to maintain a white majority legislative delegation rather than have an equal number of white and black legislators on the Richmond County delegation. While the state acknowledges that such a configuration would have this

effect on the delegation, the state has yet to explain adequately its boundary choice in this instance.

The Senate Plan

The Senate plan also continues to include instances in which the concerns of the incumbents were placed ahead of black voting potential. For example, in the DeKalb/ Clayton Counties area it appears that protection of incumbents motivated the legislature to combine portions of Clayton County with Fulton County resulting in fragmentation of concentrations of black residents into four surrounding white majority districts in the Atlanta/ DeKalb metro area (Districts 34, 42, 44, and 55). By failing to combine the black growth communities in Clayton County with the residents of the black neighborhoods in DeKalb, the state has minimized black voting potential in DeKalb County where three rather than two black voting age majority districts would have been the logical result of boundary lines that fairly recognize black voting strength in that area.

In the southwest portion of the state, from Meriwether and Peach/ Houston Counties to the Florida border, the state continues to fragment the black population concentrations by refusing to adopt alternative approaches in the Senate plan which would remedy this fragmentation and provide three districts with majority black voting age populations.

The Congressional Plan

As you know, the state's first proposed plan was rejected amid general concerns that the Georgia legislative leadership had been predisposed to limit black voting potential to two black majority voting age population districts. This concern continues with respect to the state's present redistricting plan. For example, our analysis of the process indicates that the primary controversy surrounding the Congressional plan was whether the Department's objection contemplated the drawing of a third black voting age majority district and that, while the Senate appeared to be willing to try to recognize black voting potential in the state, the House vigorously rejected such a concept.

For example, the submitted plan minimizes the electoral potential of large concentrations of black population in several areas of the state. Specifically, we note that alternatives, including one adopted by the Senate, included a large number of black voters from Screven, Effingham and Chatham Counties in the 11th Congressional District. However, due to unyielding efforts on behalf of the House members, this configuration was abandoned and no legitimate reason has been suggested to explain the exclusion of the second largest concentration of blacks in the state from a majority black Congressional district.

In southwest Georgia, our review of the proposed remedial plan indicates a similar concern. Although the submitted plan has increased the black percentage in the 2nd Congressional District, it continues the exclusion of large black population concentrations in areas such as

Meriwether, Houston, and Bibb Counties from this district. In addition, the expressed reluctance to split counties also appears pretextual given the original announcement by the redistricting leadership that such concerns should not be used to prevent the drawing of viable black districts. The state's willingness to split counties and cities in other areas of the state suggests an uneven application of its own stated criteria which appears designed to minimize black voting potential.

Several alternative redistricting approaches which created a southwest district with a majority black voting age population by including additional black communities such as the City of Macon and which did not diminish the effectiveness of the minority electorate in the 11th by including Chatham, were suggested to the legislature during the redistricting process. Despite the existence of the alternatives, however, the state refused to recognize potential black voting strength in the state and has failed to explain adequately the choices made during this round of Congressional redistricting.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1992 redistricting plans for Georgia State House, Senate and Congressional districts to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1992 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plans for Georgia House, Senate and Congressional districts continue to be legally unenforceable. *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Georgia plans to take concerning these matters. If you have any questions, you should call Sandra Coleman (202-307-3718), Deputy Chief of the Voting Section.

Sincerely,

/s/ John R. [illegible]
John R. Dunne
Assistant Attorney General
Civil Rights Division

Plaintiff's Exhibit 16A

SPLIT PRECINCTS IN 1992
GEORGIA CONGRESSIONAL REDISTRICTING

District	Number of Split Precincts
1	11
2	28
3	16
4	1
5	1
6	9
7	9
8	25
10	0
11	31

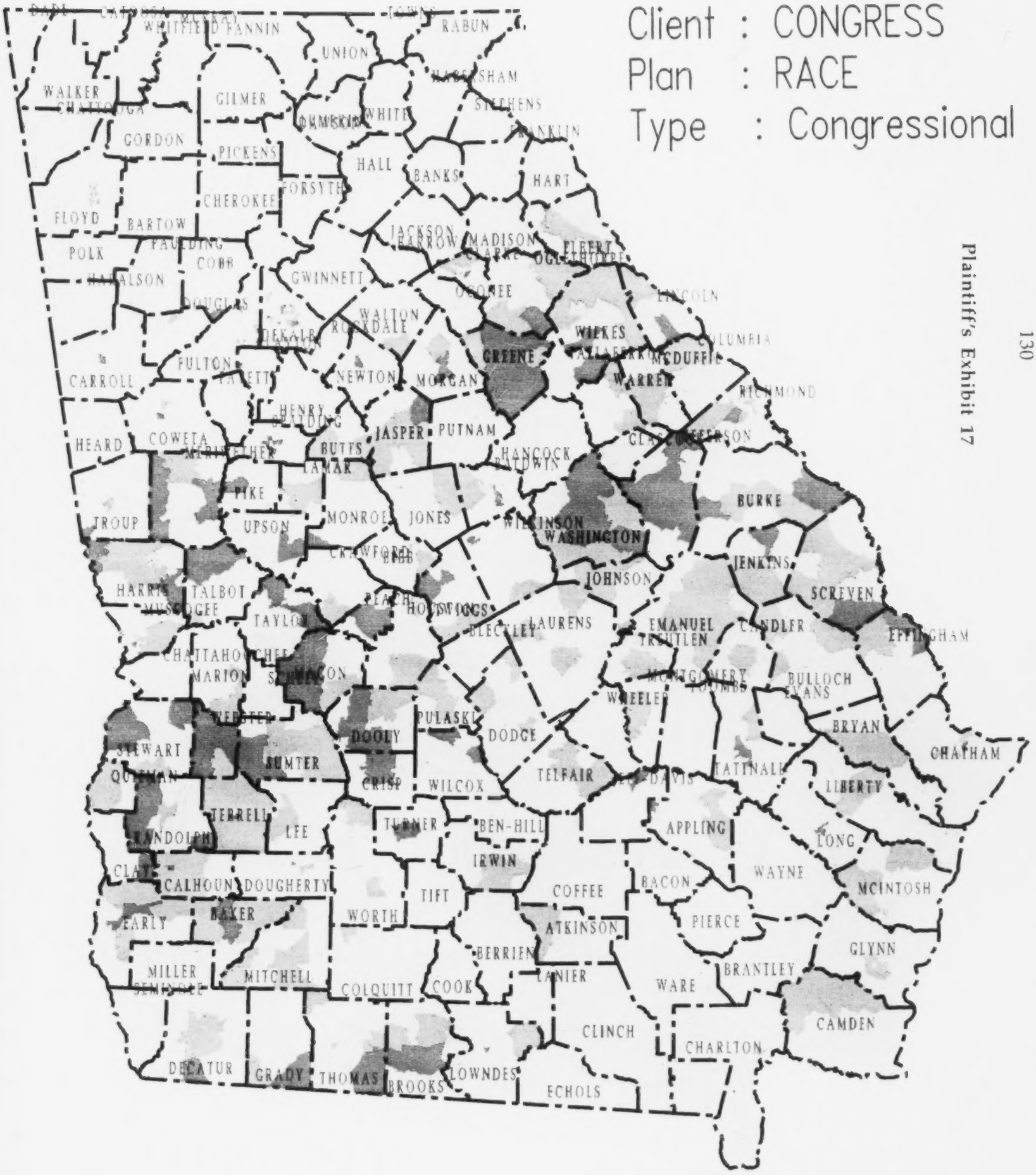
Plaintiff's Exhibit 16B

HISTORY OF SPLIT MUNICIPALITIES IN GEORGIA CONGRESSIONAL REDISTRICTING 1971-1992

Year	Number	Identity	% Increase Over 1971	% Increase Over 1982
1971	2	Atlanta, Dalton	–	–
1982	5	Atlanta Loganville Roswell Snellville Union City	150%	–
1992	31	Albany Atlanta Augusta Byron Centerville Cordele Duluth Fort Valley Lawrenceville Leesburg Macon Manchester Marietta Milledgeville Moultrie Norcross Payne Perry Port Wentworth Riverdale Roberta Savannah Smyrna Snellville	1,450%	520%

Sugar Hill
Suwanee
Thunderbolt
Valdosta
Warner Robins
Washington
Woodstock

Client : CONGRESS
Plan : RACE
Type : Congressional



PLAINTIFF'S EXHIBIT 24

TABLE 1

ELEVENTH CONGRESSIONAL DISTRICT POPULATION CONCENTRATION BY COUNTY

County	Total Pop.	% of 11th District's Total Pop.	Total Black Pop.	% Black Pop. In 11th Dist.[1]	% Of 11th Dist. Total Black Pop.
DeKalb (Split)	207,112	35.3%	154,512	74.6%	41.1%
Richmond (Split)	93,004	15.9%	61,408	66.0%	16.3%
Chatham (Split)	72,505	12.4%	60,963	84.1%	16.2%
Baldwin (Split)	30,786	5.3%	14,955	48.6%	4.0%
Burke	20,579	3.5%	10,756	52.3	2.9%
Washington	19,112	3.3%	9,874	51.7%	2.6%
Jefferson	17,408	3.0%	9,700	55.7%	2.6%
Butts	15,326	2.6%	5,438	35.5%	1.4%
Putnam	14,137	2.4%	4,748	33.6%	1.3%
Screven	13,842	2.4%	6,209	44.9%	1.7%
Greene	11,793	2.0%	5,887	49.9%	1.6%
Henry (Split)	11,450	2.0%	584	5.1%	0.2%
Wilkinson	10,228	1.7%	4,302	42.1%	1.1%
Hancock	8,908	1.5%	7,077	79.4%	1.9%
Jasper	8,453	1.4%	2,940	34.8%	0.8%
Jenkins	8,247	1.4%	3,412	41.4%	0.9%
Twiggs (Split)	7,096	1.2%	3,996	56.3%	1.1%
Warren	6,078	1.0%	3,656	60.2%	1.0%
Wilkes (Split)	4,472	0.8%	3,046	68.1%	0.8%
Glascock	2,357	0.4%	298	12.6%	0.1%
Taliaferro	1,915	0.3%	1,167	60.9%	0.3%
Effingham (Split)	1,387	0.2%	657	47.4%	0.2%
Total	**586,195**	**100.0%**	**375,585**		**100.0%**

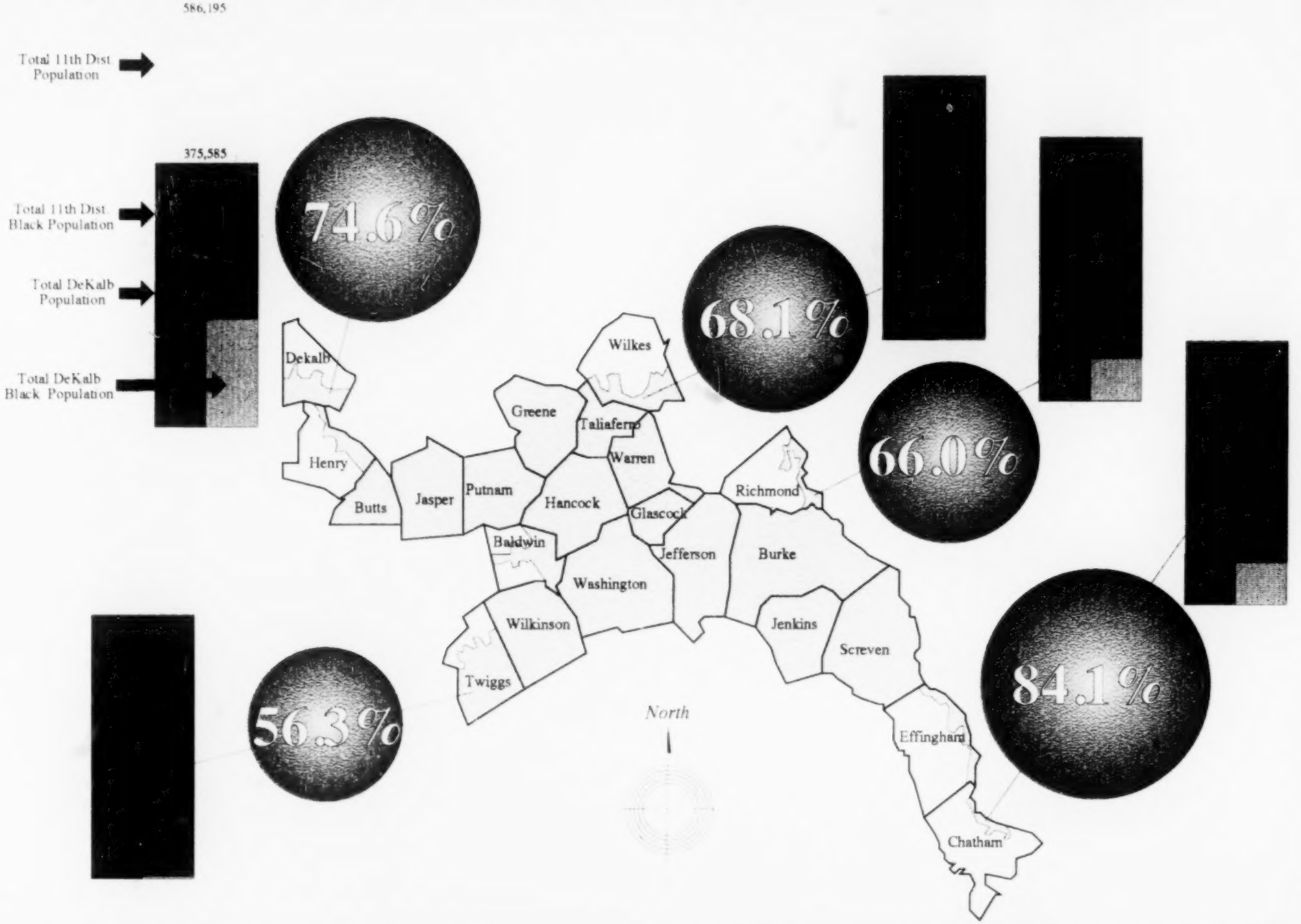
[1]Total black population in county (or 11th District portion) divided by total population in county (or 11th District portion).

TABLE 2

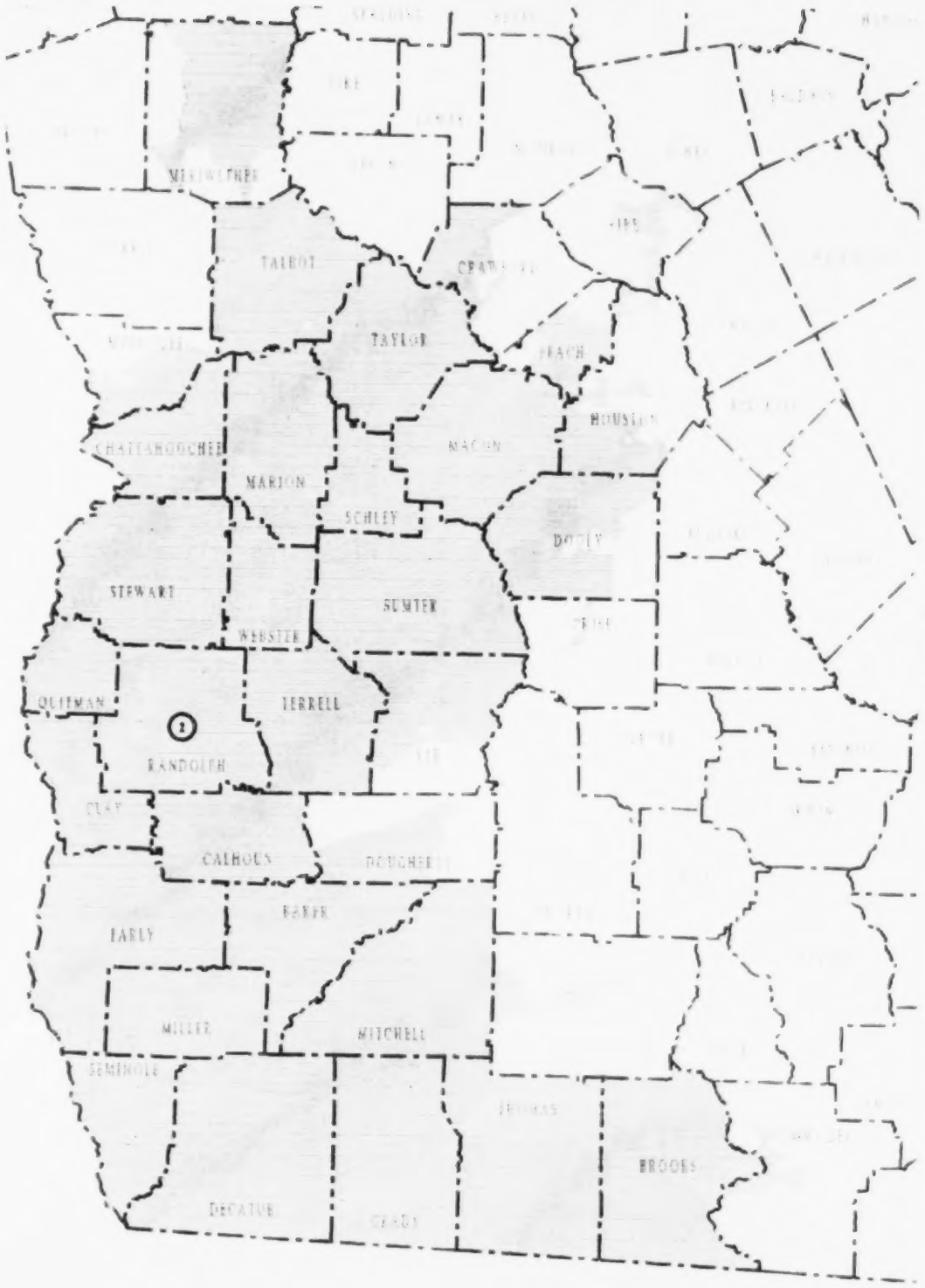
LAND AREA OF COUNTIES IN ELEVENTH CONGRESSIONAL DISTRICT

County	Square Mile	% of County
DeKalb (Split)	122.83	45.8%
Richmond (Split)	89.66	27.66%
Chatham (Split)	29.47	6.8%
Baldwin (Split)	142.49	55%
Burke	830.6	
Washington	680.5	
Jefferson	527.7	
Butts	186.6	
Putnam	344.5	
Screven	648.5	
Greene	388.4	
Henry (Split)	90.9	28.2%
Wilkinson	446.6	
Hancock	473.3	
Jasper	370.5	
Jenkins	349.8	
Twiggs (Split)	253.2	70.3%
Warren	285.5	
Wilkes (Split)	110.2	23.4%
Glascock	144.2	
Taliaferro	195.4	
Effingham (Split)	72.8	15.2%
Total	**6,783.65**	

Georgia Eleventh District Population Distribution



Plaintiff's Exhibit 29



Client : CONGRESS
Plan : C2
Type : Congressional

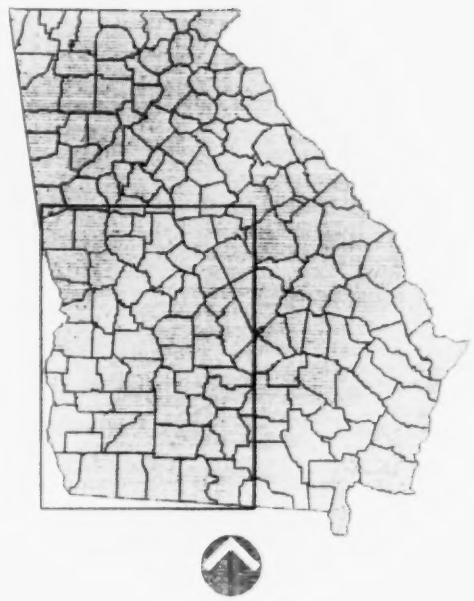


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TABLE 6

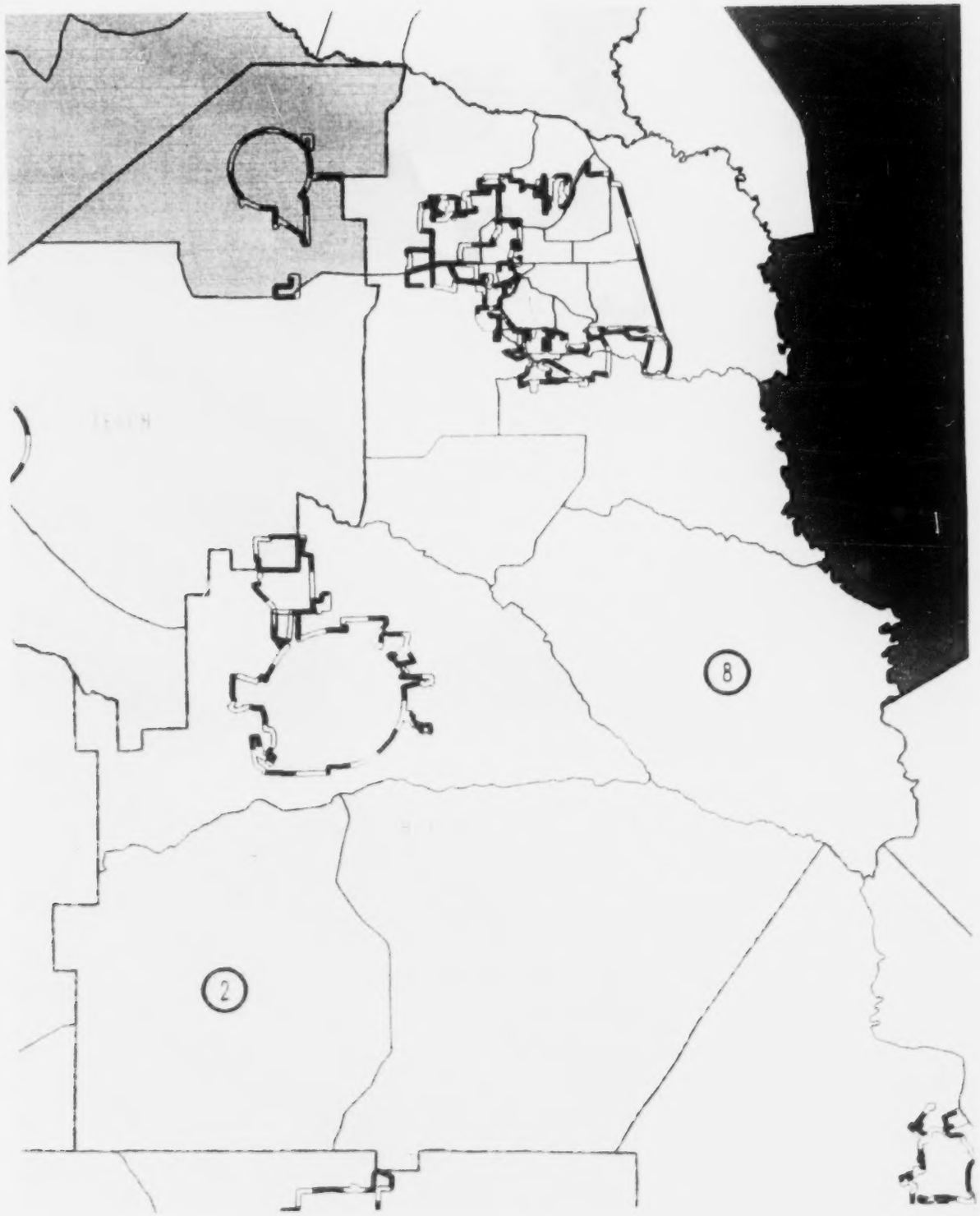
SPLIT COUNTIES OF THE SECOND CONGRESSIONAL DISTRICT

County	Total County Pop.	Total County Pop. In Dist. 2	% of County Pop. In Dist. 2	% of Dist. 2 Pop.	Total County Black Pop.	Pop. In County/% Black	Total Black Pop. In Dist. 2	% County Black Pop. In Dist. 2	Pop. in 2nd/% Black	Pop. Outside 2d/% Black	% Total Black Pop. In 2nd
Bibb	149,697	74,401	49.6%	12.6%	62,526	41.7%	51,547	82.4%	69 %	14.5%	15.4%
Colquitt	36,645	8,490	23.2%	1.4%	8,861	24.2%	5,736	64.7%	67.6%	11.1%	1.7%
Crawford	8,991	2,291	25.5%	0.4%	2,757	30.7%	1,665	60.4%	72.7%	16.5%	.5%
Crisp	20,211	7,224	36.1%	1.2%	8,153	40.3%	6,888	84.5%	95.3%	9.7%	2.06%
Dooly	9,901	8,922	90.1%	1.5%	4,852	49%	4,594	94.7%	51.4%	26.4%	1.4%
Dougherty	96,311	52,574	54.6%	8.9%	48,387	50.2%	40,890	84.5%	77.8%	17 %	12.2%
Houston	89,208	22,545	25.3%	3.8%	19,376	21.7%	11,523	59.5%	51.1%	11.8%	3.4%
Lee	16,250	4,117	25.3%	0.7%	3,135	19.3%	2,506	79.9%	60.9%	5.2%	.7%
Lowndes	75,981	24,038	31.6%	4.1%	24,241	31.9%	16,026	66.1%	66.7%	39.2%	4.8%
Meriwether	22,411	14,744	65.8%	2.5%	9,989	44.6%	7,852	78.6%	53.3%	27.9%	2.3%
Muscogee	179,278	89,814	50.1%	15.2%	68,161	38%	59,265	86.9%	66. %	10 %	17.7%
Peach	21,189	10,573	49.9%	1.8%	10,075	47.5%	7,845	77.9%	74.2%	21 %	2.34%

PLAINTIFF'S EXHIBIT 29A

County	**Pop. In** County/% Black	**Pop. in** 2nd/% Black	**Pop.** Outside 2d/% Black	**% County** Black Pop. In Dist. 2
Bibb	41.7%	69 %	14.5%	82.4%
Colquitt	24.2%	67.6%	11.1%	64.7%
Crawford	30.7%	72.7%	16.5%	60.4%
Crisp	40.3%	95.3%	9.7%	84.5%
Dooly	49%	51.4%	26.4%	94.7%
Dougherty	50.2%	77.8%	17 %	84.5%
Houston	21.7%	51.1%	11.8%	59.5%
Lee	19.3%	60.9%	5.2%	79.9%
Lowndes	31.9%	66.7%	39.2%	66.1%
Meriwether	44.6%	53.3%	27.9%	78.6%
Muscogee	38%	66. %	10 %	86.9%
Peach	47.5%	74.2%	21 %	77.9%

Plaintiff's Exhibit 32



Client : CONGRESS
Plan : C1992
Type : Congressional

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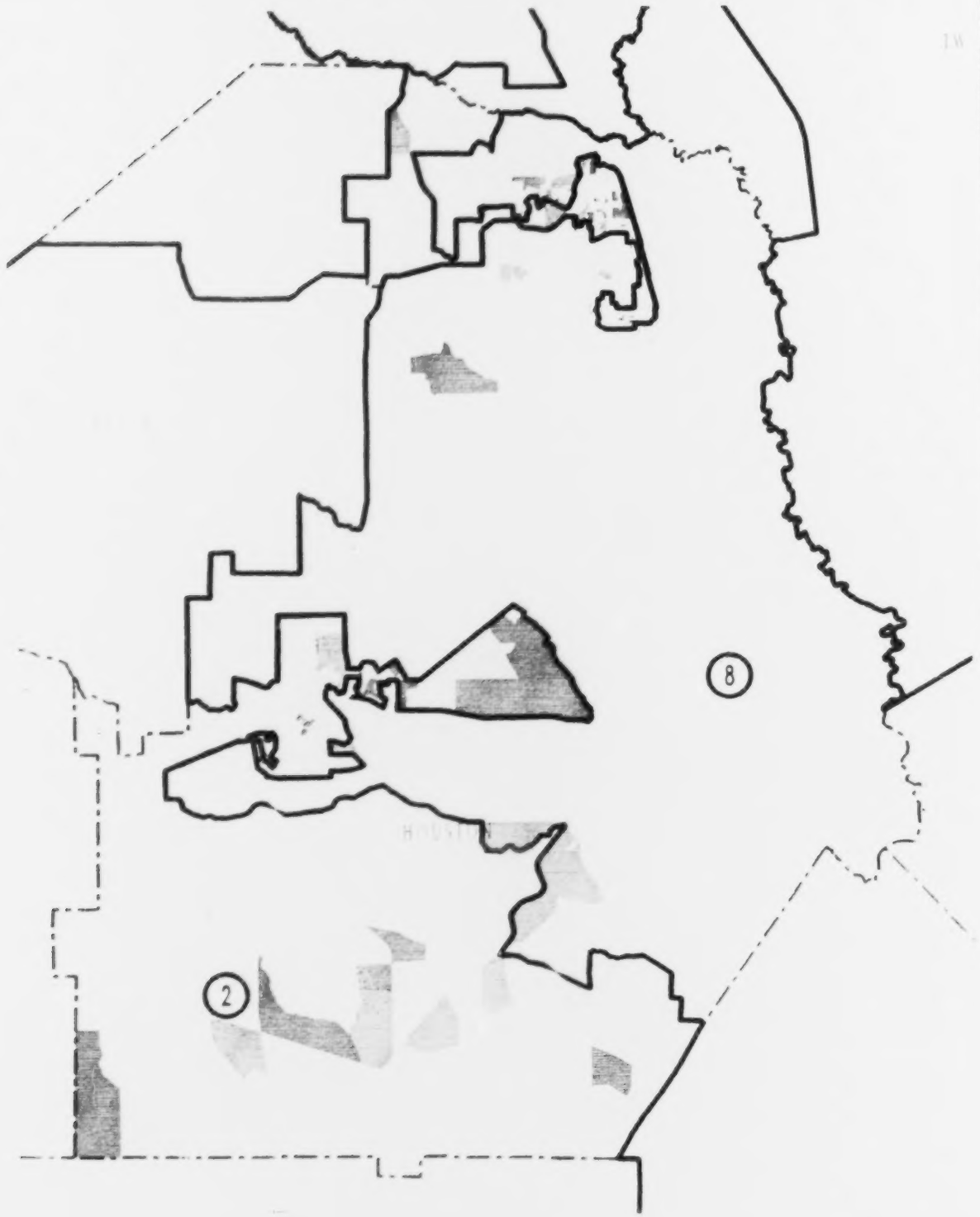
Plaintiff's Exhibit 38



Client : CONGRESS
Plan : C1992
Type : Congressional

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Georgia General Assembly

Supreme Court, U.S.
FILED
FEB 23 1995
OFFICE OF THE CLERK

Nos. 94-929, 94-631, and 94-797

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ZELL MILLER, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

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DEVAL L. PATRICK
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QUESTIONS PRESENTED

1. Whether a districting plan is always subject to strict scrutiny if race has been a substantial or motivating factor in its creation.

2. Whether the boundaries of Georgia's Eleventh Congressional District are so bizarre on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether the State's creation of District Eleven is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs below were Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of the State of Georgia. Intervenor-defendants were Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	13
Argument:	
I. Georgia's redistricting plan is not subject to strict scrutiny	16
A. An inquiry into legislative intent alone can not determine whether a redistricting plan is subject to strict scrutiny	16
B. Georgia's Eleventh District is not so highly irregular on its face that it can be understood only as an effort to segregate the races for purposes of voting	23
II. The Eleventh district satisfies strict scrutiny	28
A. The State had a compelling interest in drawing the Eleventh District as a majority-district	28
B. The State's plan is narrowly tailored to further its compelling interests	40
Conclusion	43
Appendix	1a

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U.S. Const.:
Amend. XIV (Equal Protection Clause) 2, 16, 17, 19, 20, 30
Amend. XV 20
Voting Rights Act, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... 2, 10, 11, 12, 14, 15, 21, 28, 36, 38
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Section 51.5 4
Section 51.29 34
Section 51.29(c) 34
Section 51.29(d) 35
Section 51.30(a) 34
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Section 51.59 11
Sup. Ct. R. 18.1 2

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-929

UNITED STATES OF AMERICA, APPELLANT

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DAVIDA JOHNSON, ET AL.

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v.

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No. 94-797

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-102a)[1] is reported at 864 F. Supp. 1354.

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[1] "J.S. App." refers to the appendix to the United States' Jurisdictional Statement.

JURISDICTION

The judgment of the three-judge court was entered on September 12, 1994. The United States filed a notice of appeal on September 20, 1994 (J.S. App. 105a-106a), and an amended notice of appeal on September 22, 1994 (J.S. App. 107a-108a).[2] The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, are reproduced at App., *infra*, 1a-3a.

STATEMENT

This case concerns a constitutional challenge to the configuration of the Eleventh District in Georgia's 1992 congressional redistricting plan. A three-judge district court held that the Eleventh District violates the Fourteenth Amendment under standards set forth in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). The United States, three of the four defendant state officials, and the private defendant-intervenors (Abrams defendants) have appealed from that judgment.

1. The population of the State of Georgia is approximately 27% African-American. J.S. App. 68a. Georgia has an extensive history of discrimination in voting. The district court took judicial notice of the fact that, "[f]rom the state's first Constitution—which barred blacks from voting altogether—through recent times, the state has

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[2] The first notice of appeal did not specify the statute under which the appeal was taken. See Sup. Ct. R. 18.1. The amended notice of appeal specified that the appeal was being taken pursuant to 28 U.S.C. 1253.

employed various means of destroying or diluting black voting strength." *Id.* at 103a-104a. Those means, which the court found had been enacted into law as late as 1958, included literacy tests, property requirements, white-only primaries, and the county unit system. The court specifically noted that "[c]ongressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential." *Id.* at 104a. That was accomplished by "packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts." *Ibid.*

From Reconstruction until the 1980's, black voters were not in the majority in any of the State's congressional districts. Following the 1970 census, the Attorney General interposed a Section 5 objection to Georgia's congressional redistricting plan, which fragmented African-American population concentrations in the Atlanta area. Joint Statement of Stipulated Facts 44-49. The State then adopted, and the Attorney General precleared, a revised plan that remedied the fragmentation, but that did not have an African-American majority district. See *Busbee* v. *Smith*, 549 F.Supp. 494, 500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

Following the 1980 census, the State drew a redistricting plan that included one majority African-American district (the Fifth District) in the Atlanta area (out of a total of ten Georgia congressional districts), but that nonetheless fragmented the African-American community in that area. The Attorney General again interposed a Section 5 objection, and the State sought preclearance from the United States District Court for the District of Columbia. The court denied preclearance on the ground that the plan had "a discriminatory purpose in violation of Section 5." 549 F. Supp. at 517. The court held that the plan "implemented a scheme designed to minimize black voting strength to the extent possible." *Id.* at 518. In

particular, the court noted that the State had applied its supposed districting principles selectively:

> The purported goals of maintaining 'historical borders,' preserving county and city lines and avoiding a Republican Fourth District were only pretexts for discrimination. Those goals were ignored when drawing the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Districts. * * * The goal of uniting a cohesive voting bloc was followed in the white mountain district; it was abandoned in the black south Fulton and DeKalb area.

Busbee, 549 F. Supp. at 515. The court also noted that the legislature had turned down a plan passed by the State Senate that provided for a district that did not split the black community of Atlanta. *Id.* at 504-512. Although the Fifth District had a bare African-American population majority, the court concluded that it nevertheless "was drawn to suppress black voting strength in Georgia." *Id.* at 515. The court ultimately precleared a revised plan that remedied the fragmentation. *Id.* at 520.

2. Following the 1990 census, Georgia became entitled to 11 congressional seats, a gain of one seat since 1980. In a special session in 1991, the state legislature passed a redistricting plan that included two majority-minority districts: the Eleventh, in east-central Georgia, and the Fifth, in the Atlanta area. In addition, the plan included a district—the Second District, in the southwest part of the State—in which African-Americans comprised approximately 35% of the voting age population. J.S. App. 12a-14a. See J.A. 98 (map).

The State submitted the plan for preclearance under Section 5 of the Voting Rights Act. Acting on behalf of the Attorney General (see 28 C.F.R. 51.5), the Assistant Attorney General for Civil Rights interposed an objection. The Attorney General's objection letter stated that there was "[a] concern * * * that the Georgia legislative leadership was predisposed to limit black voting

potential to two black majority districts." J.A. 105. The letter went on to note that the plan failed to "recognize the black voting potential of the large concentration of minorities in southwest Georgia" and that the legislature was aware of alternatives that would have recognized that potential. J.A. 105. The letter added that:

> Notwithstanding these alternatives, the state redistricting leadership did not make a good faith attempt to recognize the concentrations of black voters in the southwest and has not yet been able to adequately explain the departure from its own stated criteria and what appears to be resulting minimization.

J.A. 105-106. The letter also noted some other concerns with the plan, and concluded that the Attorney General could not "conclude * * * that the state's burden has been sustained in this instance with respect to the * * * plan[] under review." J.A. 106.

The state Senate then passed a plan that contained three majority-minority districts, the Second, the Fifth, and the Eleventh. See J.A. 98 (map). The Senate plan made the Second District a majority-minority district by extending it into Macon, in the central part of the State. The plan made up for the resulting loss of minority population in the Eleventh District by extending that district to Savannah. J.S. App. 16a. However, the House refused to pass that plan. The plan that the legislature then enacted contained two majority-minority districts (the Fifth and the Eleventh), increased the black voting age population in the Second District to 45%, and made a few other modifications to the previous plan. *Id.* at 16a & n.9.

The Attorney General again objected. The letter interposing the Section 5 objection stated that the concern "that the Georgia legislative leadership had been predisposed to limit black voting potential to two black majority voting age population districts * * * continues." J.A. 124. The letter noted that the plan enacted by the state Senate was abandoned "due to unyielding efforts on behalf of House members," and "no legitimate reason

has been suggested to explain the exclusion of the second largest concentration of blacks in the state [in Savannah] from a majority black Congressional district." J.A. 124. The letter also noted that the Second District did not include "large black population concentrations" in three counties, and that "the expressed reluctance to split counties * * * appears pretextual," in light of "[t]he state's willingness to split counties and cities in other areas of the state." J.A. 124-125. Because the State had "failed to explain adequately the choices made during this round of Congressional redistricting," J.A. 125, the letter concluded that an objection had to be interposed because the State had once again failed to sustain its burden under Section 5. J.A. 125.

After this objection, the State (at the advice of a Senior Assistant Attorney General of the State, Mark Cohen) decided not to seek preclearance for the revised plan in the District Court for the District of Columbia. Cohen subsequently testified that he believed at the time that such a suit would have been unsuccessful. That conclusion, he said, was based on similarities between the circumstances presented in 1992 and those underlying the unsuccessful *Busbee* suit a decade before. J.S. App. 20a n.11.

The state legislature then enacted a new plan that had three majority-minority districts and was similar to the plan the state Senate had previously passed. See J.S. App. 21a & n.12. See also J.A. 98 (map). In enacting this plan, the State clearly intended to create three majority-minority districts. The undisputed evidence at trial, however, showed that many other considerations also went into determining the boundaries of the Eleventh District. For example, in order to avoid dividing rural counties, while maintaining a majority of minority voters, it was necessary to create more irregular boundaries in urban areas. J.S. App. 43a n.26. The DeKalb County portion of the district was drawn to include a particular (largely white) precinct in the district to accommodate the desire of an incumbent state Senator regarding the placement

of the precinct in which his son lived. 2 Tr. 187, 202 (testimony of Linda Meggers). The boundaries of the extension of the district to Savannah through Effingham and Chatham Counties were determined by a number of factors. The corridor through Effingham County was substantially narrowed to respect the wishes of a state representative who wanted as much as possible of the County to remain in the First Congressional District. That narrowing required omission of black as well as white voters. 1 Tr. 106-108; 2 Tr. 189-190, 212-215 (testimony of Linda Meggers). In Chatham County, the district was narrowed to exclude a heavily African-American community in Garden City, a community just north of Savannah, because a state Representative wanted the entire city kept intact. 2 Tr. 218-220 (testimony of Linda Meggers). The Savannah extension was also configured by "the narrowest means possible" because an incumbent state Representative wanted certain areas excluded. 4 Tr. 174 (testimony of Johnnie Dixon). That configuration was adopted despite the fact that a much wider extension would have had little or no effect on the racial composition of the district. 4 Tr. 172-173, 175-178, 181-183 (testimony of Johnnie Dixon).

The plan was submitted to the Department of Justice for Section 5 preclearance. The Attorney General precleared the plan, and it took effect. J.S. App. 22a-23a.

3. In January, 1994, five white residents of the Eleventh Congressional District filed suit in the United States District Court for the Southern District of Georgia, alleging that the Eleventh District segregated voters on the basis of race in violation of the Equal Protection Clause. A three-judge court was convened. The United States and a number of citizens of Georgia intervened in support of the defendants. A trial took place on July 21-28, 1994. By a 2-1 vote, the three-judge court ruled that the configuration of the Eleventh District violated the Fourteenth Amendment. J.S. App. 1a-102a.

a. The district court narrated the history of the State's post-1990 redistricting in some detail and extensively dis-

cussed the Section 5 review of the various state plans undertaken by the Department of Justice. J.S. App. 5a-27a. From the beginning of the process, a plan with three majority African-American districts had been developed by the American Civil Liberties Union (ACLU) on behalf of the Black Caucus of the General Assembly and presented to the state legislature. *Id.* at 6a-7a. That plan included an extension of the Eleventh District to Savannah and the inclusion of portions of Macon in the Second District. Those elements, the court noted, were employed by the State in the plan that was finally enacted and precleared, although the final plan differed in other important ways from the ACLU's plan. *Id.* at 6a-9a, 101a (map). The court also stated that the ACLU had repeatedly brought its plan to the attention of the Department of Justice in the course of the Section 5 preclearance process; that the ACLU had used that plan to argue to the Department of Justice that the State's first two enacted redistricting plans should not be precleared; and that the Department of Justice's "criteria for and opinions of Georgia's submissions were greatly influenced by [the ACLU's attorney] and her agenda." *Id.* at 10a. The court stated that the State did not seek a Section 5 declaratory judgment, not only because of fear that such a suit would be unsuccessful, as the *Busbee* suit had been ten years earlier, but also because litigation would have been expensive and time consuming. *Id.* at 20a-21a & n.11.

With respect to the merits of plaintiffs' claim, the court held that the Eleventh District is subject to strict scrutiny. In *Shaw* v. *Reno, supra,* this Court held that a district is subject to strict scrutiny if it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S. Ct. at 2824. In the district court's view, that language does not suggest that "[t]he shape of the district is * * * a 'threshold' inquiry preceding an exploration of the motives of the legislature." J.S. App. 29a. Instead, the shape is simply " 'objective' evidence of the legislature's intent in

drafting that district," *ibid.*; "[t]he purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards," *id.* at 41a. Therefore, the court concluded, a plaintiff can make out a *Shaw* claim *either* through proof concerning "a district's shape as circumstantial evidence of legislative intent," *id.* at 40a, *or* through "direct testimony of those involved with the [redistricting] process" concerning "the legislature's intent," *ibid.*

The district court held that strict scrutiny must be applied if "race was the *substantial or motivating* consideration in creation of the district in question"—a criterion the court explained as being satisfied if race is "*the overriding predominant force* determining the lines of the district." J.S. App. 35a (footnote omitted). In reaching that conclusion, the court rejected the view of the district court in *Hays* v. *Louisiana,* 839 F. Supp. 1188 (W.D. La. 1993), vacated and remanded on other grounds, 114 S. Ct. 2731 (1994), that race "need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect." J.S. App. 33a. The court explained that adoption of the *Hays* standard would lead to jurisdictions covered under Section 5 of the Voting Rights Act being "buried under *Shaw* litigation" every time they passed a redistricting plan. J.S. App. 38a-39a. The court also rejected the view that "race must have been the *sole* motivation behind a particular district shape before strict scrutiny is appropriate." *Id.* at 33a. In the court's view, "th[at] standard would be nearly impossible to meet." *Id.* at 39a.

The district court found that the "indirect" evidence of legislative intent was sufficient in this case to subject the Eleventh District to strict scrutiny, because various portions of the district had irregular boundaries. In particular, the court held that "[t]he extension [of the district] to Savannah is not compact by any credible definition of that term," J.S. App. 43a; that the Augusta portion reflected a selective inclusion of predominantly African-

American census blocks, *id.* at 45a; and that the Eleventh District as a whole split eight of its 22 counties, a result that the court believed to be unnecessary, *id.* at 47a. The court also held that there was sufficient "direct" evidence that the legislature had a "predominant" racial motive for drawing the Eleventh District. *Id.* at 48a-51a. In particular, the court adverted to the testimony of state legislators that their purpose in extending the Eleventh District to Savannah was to include African-American voters in the district, in part to compensate for the African-American voters who were removed from the Eleventh District as previously configured and added to the Second District to make that a majority-minority district. *Id.* at 48a-50a. The court also referred to evidence that other portions of the district were drawn in order to include African-Americans in the district. *Id.* at 49a.

The district court then applied strict scrutiny. The court held that the only compelling state interest that could potentially justify the Eleventh District was the State's interest in complying with Sections 2 and 5 of the Voting Rights Act. J.S. App. 56a-57a. The district court assumed the existence of that interest and held that what it viewed as the "narrow tailoring" inquiry was crucial to the disposition of the case: whether "the district[], as precleared and enacted, [was] genuinely 'reasonably necesary' * * * to comply with the [Voting Rights Act]." *Id.* at 60a (citation omitted).

The court held that the Eleventh District failed that "narrow tailoring" test. In the court's view, the fact that the Department of Justice had refused preclearance of the State's earlier attempts at redistricting after the 1990 census did not establish that creating the Eleventh District was reasonably necessary to satisfy Section 5 of the Voting Rights Act. Instead, the court held that the plan would "live or die" on the basis of the court's independent determination of "whether Georgia's 1992 congressional redistricting plan was actually required by the [Voting Rights Act] and Supreme Court precedent." J.S. App. 63a.

With respect to Section 5, the court determined that the Department of Justice had erred in objecting to either of the first two plans submitted.[3] The court did not directly address the "purpose" prong of Section 5 in this portion of its opinion, although this was the basis articulated by the Department of Justice for its objections to those plans. Earlier in the opinion, however, the court reported that two state officials had found no "evidence of acts or statements by * * * legislators indicating an intent to discriminate against minority voters." *Id.* at 13a. The court commented, in that context, that it "finds no evidence prompting [it] to doubt" the conclusion that the original two plans were untainted by racially discriminatory purpose. *Id.* at 13a.

The court also held that the Eleventh District was not required by Section 2 of the Voting Rights Act. J.S. App. 80a. The court reached that conclusion by applying the preconditions set forth by the Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). The court found that the district was not "compact" because the "populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other[.]" J.S. App. 79a. The outside perimeter of the district, the court found, included "hooks, tails and protrusions" in and near densely populated urban

[3] The court held that the objections to the earlier Georgia plans were inconsistent with regulations "promulgated by Congress to assist DOJ in properly enforcing the [Voting Rights] Act." J.S. App. 64a-65a (citing 28 C.F.R. 51.59). The court went on to discuss the regulations in terms of what "Congress intended," J.S. App. 65a; what "Congress was apparently worried" about, *ibid.*; and how "Congress uses" a particular term in the regulations, *id.* at 66a. The regulations to which the court referred, however, were not enacted by Congress; they were promulgated by the Attorney General. See 52 Fed. Reg. 490 (1987). There is no indication in the court's opinion that it gave any deference to the Attorney General's interpretation of her own regulations.

areas at its periphery. *Id.* at 79a. The court also found that racial polarization "exists, but not in alarming quantities"; the court found that from 22% to 38% of white people in the area would vote for African-American candidates, while 20% to 23% of African-Americans in the area would vote for white candidates. *Id.* at 82a. The court concluded that the State would not have violated Section 2 if it had failed to draw the Eleventh District as a majority-minority district.

Finally, the court concluded that, even assuming that the preconditions for a Section 2 Voting Rights Act violation existed in the area covered by the Eleventh Congressional District, the district "overstepped the requirements" for compliance and therefore was not narrowly tailored. J.S. App. 68a. The court based this conclusion on the testimony of the State's expert witness, which indicated to the court that the Eleventh District was more "safe" than necessary for black voters. *Id.* at 83a-86a.

b. Judge Edmondson dissented. In Judge Edmondson's view, "[h]ighly irregular shape—the appearance of the district—is the critical element of" the cause of action recognized by this Court in *Shaw*. J.S. App. 93a. Accordingly, he rejected the court's holding that a district's "shape is merely one piece of circumstantial evidence proving the legislature's intentional use of race." *Id.* at 94a. He noted that *Shaw*'s "highly-irregular-appearance standard * * * avoids the unreliability of after-the-fact statements by legislators and also avoids the necessity of federal judges probing and intruding on state officers' thoughts (perhaps expressly crediting some state officers and not crediting others—a divisive event) to 'learn' the state's true intent." *Id.* at 94a n.2.

Judge Edmondson found that the Eleventh District was not "bizarre or highly irregular within the meaning of *Shaw*." J.S. App. 96a. He noted that the size of the

district, the length of its borders, and its location within the State were not out of the ordinary. *Id.* at 97a-98a. Moreover, he noted that the Eleventh District's boundaries follow existing state, county and city borders to approximately the same extent (71%) as the average for the State's other congressional districts; that "Georgia's congressional districts have no tradition of being neat, geometric shapes"; that portions of other districts are more irregular than the particular portions of the Eleventh District criticized by the majority; and that other districts in Georgia's current plan, as well as past plans, split counties. *Id.* at 98a-100a. He concluded that the district "is not so bizarre on its face to justify, pursuant to the Constitution, a more searching inquiry," and that the district court accordingly should not "interfere with the reapportionment plan that resulted from Georgia's political process." *Id.* at 100a.

4. The district court enjoined the completion of the 1994 election cycle in the Eleventh District and stated that it would hold a remedial hearing after receiving submissions from interested parties. J.S. App. 89a. The Governor and two of the other state defendants, the private intervenor-defendants, and the United States moved for a stay in this Court. On September 23, 1994, this Court granted the stay pending the filing and disposition of the appeals in this case. 115 S. Ct. 36.

SUMMARY OF ARGUMENT

1. A. The district court held that, under this Court's decision in *Shaw* v. *Reno*, a majority-minority district is always subject to strict scrutiny if the State's "predominant" motive in creating the district was to create a majority-minority district. That conclusion is incorrect. Nothing in this Court's opinion in *Shaw* v. *Reno* suggests that a "predominant motive" to create a majority-minority district alone requires strict scrutiny. To the

contrary, the Court repeated numerous times in *Shaw* that the constitutional claim it recognized in that case arose because the shape of a majority-minority district "on its face" was so extremely irregular that it could only be understood as an effort to segregate voters racially.

The district court's standard is incorrect because a State should be free to give the same consideration to the interests of racial minorities in redistricting that it gives to the interests of other groups. The fact that a State strongly desires to create a majority-minority district indicates only that it is willing to treat minority interests on a par with those of other groups for whom majority influence districts are created. Nor is the State's action in creating such a district likely to have any discriminatory impact. Subjecting such a district to strict scrutiny is, moreover, inconsistent with Congress's determination that States must, in some circumstances, create minority districts in order to comply with Sections 2 and 5 of the Voting Rights Act. The district court's standard is also unworkable, since there is no judicially manageable standard for a court to determine whether a particular purpose, out of many that may have motivated a districting plan, is "predominant."

B. A redistricting plan that creates a majority-minority district is suspect under *Shaw* only if, in drawing the district, the State departs dramatically from its traditional districting practices. The Eleventh District, however, fits comfortably within Georgia's ordinary districting practices. It occupies an area similar in shape to the Tenth District, as that district has been configured for many years. Its physical area is about at the State's average. It follows existing boundaries of political subdivisions to a greater extent than most districts in the State. Although it contains a larger percentage of African-Americans than does the State as a whole, that suggests only that the State intended to draw a majority-minority district. The fact that the Eleventh District's borders (like those of other districts in the State) are irregular in places does not establish that

the shape of the Eleventh District, viewed as a whole, is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

2. In any event, the Eleventh District satisfies strict scrutiny because it is narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act and ameliorating the present effects of racially polarized voting.

A. To demonstrate that the State had a compelling interest in complying with Sections 2 and 5 in this case, it need not be shown that failing to draw a third majority-minority district would surely have subjected the State to liability under Sections 2 or 5 of the Voting Rights Act. It need only be shown that there was a "strong basis in evidence" for concluding that the State's failure to draw such a district would have led to a prima facie case against it under the Voting Rights Act. That showing was made here.

First, the State's interest in complying with Section 5 supported its action. The Attorney General had interposed Section 5 objections to the State's two previous plans. The State therefore could reasonably rely upon the Attorney General's objections as requiring it to draw a third minority district, so long as those objections were not clearly insupportable. In this case the objections, based on the "purpose" prong of Section 5, were supported by settled modes of analyzing whether state action is motivated by a racially discriminatory purpose.

Second, the State's interest in complying with Section 2 of the Voting Rights Act also supported its decision to draw three majority-minority districts. There was a sound basis in evidence for believing that all three of the *Gingles* preconditions were satisfied. In addition, the State had a strong basis for believing that African-Americans in Georgia would be substantially underrepresented in Congress unless a third majority-minority district were drawn.

The State also had a compelling interest in ameliorating the effect that historical discrimination and racially polarized voting continue to have on the opportunity of minority voters to elect a candidate of their choice in Georgia. Faced with the kind of extreme bloc voting present in Georgia, the State could properly seek, through districting, to ensure a fair allocation of political power.

B. Finally, the State's plan is narrowly tailored. It creates only the number of majority-minority districts that the States' interests in complying with the Voting Rights Act and fairly allocating political power justify. It does not needlessly pack minority voters into the majority-minority districts; the percentage of minority voters in the Eleventh District is well within the range that the State reasonably could have thought to be necessary to satisfy the identified compelling interests. And it gives sufficient weight to other redistricting interests.

ARGUMENT

I. GEORGIA'S REDISTRICTING PLAN IS NOT SUBJECT TO STRICT SCRUTINY

A. An Inquiry Into Legislative Intent Alone Can Not Determine Whether A Redistricting Plan Is Subject To Strict Scrutiny

The district court held that a redistricting plan must be subject to strict scrutiny under the Equal Protection Clause if "race was the *substantial or motivating consideration* in creation of the district in question." J.S. App. 35a. The court explained that standard as requiring strict scrutiny if the legislature "(a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district." *Ibid.* According to the court, strict scrutiny is not required "[i]f race, how-

ever deliberately used, was one factor among *many of equal or greater significance* to the drafters." *Ibid.*

In our view, the district court's standard does not follow from this Court's decision in *Shaw* and is incorrect. A legislature's intent to create a majority-minority district (or to otherwise include some minority voters in, or exclude some minority voters from, a district) is not alone sufficient to trigger strict scrutiny of the legislature's redistricting. Under *Shaw* and this Court's decision in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977), so long as the resulting district is not "bizarre," an intent to create a majority-minority district does not trigger strict scrutiny.

1. In our Brief in *United States* v. *Hays*, Nos. 94-558 and 94-627, we submit that the district court in that case erred in holding that the intent to create a majority-minority district was alone sufficient to trigger strict scrutiny. See *Hays* U.S. Br. 14-20. On the contrary, a State must be free, under the Equal Protection Clause, to give the same consideration to the claims of racial minority groups to influence redistricting as to the claims of other interest groups in the redistricting process. *Id.* at 15-17. Nor does the mere intent of a legislature to create a majority-minority district have the ill effects that this Court in *Shaw* identified as flowing from the creation of highly irregular districts that can be understood solely in racial terms. *Id.* at 17-18. Subjecting a plan to strict scrutiny merely on the basis of the State's intent to create a majority-minority district would also conflict directly with Congress's judgment, in enacting the Voting Rights Act, that States should be conscious of the racial consequences of their redistricting decisions. *Id.* at 18-19. And it would often confront States with a dilemma, in which they would face litigation with minority voters if they refuse to create a majority-minority district and litigation from others if they do. *Id.* at 19. Finally, a

broad holding that intent alone is sufficient to subject a plan to strict scrutiny would inevitably subject a very large number of redistricting plans at all levels of government to strict scrutinty. *Id.* at 20.[4]

2. The district court in this case attempted to remedy the deficiencies in the *Hays* court's bare intent standard by holding that a districting plan is subject to strict scrutiny only if "race was the *substantial or motivating consideration* in creation of the district in question." J.S. App. 35a (footnote omitted). The district court elaborated its point by stating that race must be an "*overriding predominant force* determining the lines of the district," *ibid.*, or that race must be "the most prominent element driving the legislatures' planning," *id.* at 35a n.19. The court contrasted that with cases in which race "was one factor among *many of equal or greater significance* to the drafters," *id.* at 35a, or where it was "one motivation among others of equal strength propelling the process," *id.* at 35a n.19. In those cases, the court held, strict scrutiny would be inappropriate.

Under the district court's standard, a court must inquire about the extent to which "the legislature was * * * consciously influenced by race" in drawing a challenged majority-minority district. J.S. App. 35a. That inquiry will be of particular importance in cases in which the challenged district comports with the State's ordinary districting practices, because the application of strict scrutiny

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[4] The district court in this case did not disagree with this last conclusion. The court observed that the district court in *Hays* had held "that race need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect." J.S. App. 33a. But, the court noted, if that standard were adopted, "every state and local government in the United States subject to section 5 of the Voting Rights Act [would] be buried under *Shaw* litigation every time it passes a redistricting plan." *Id.* at 38a-39a. The district court properly was "reluctant to conclude that [this Court] intended voting rights litigation to sweep the country at ten-year intervals." *Id.* at 39a.

to such districts will, under the district court's analysis, turn on the "predominant motive" inquiry. The court must also determine whether, among the "other redistricting considerations [that] may also have consciously influenced the district shape," race was—in the court's various formulations—the "substantial or motivating," "overriding," "predominant," or "most prominent" one. *Id.* at 35a & n.19. In other words the inquiry focuses on the relative weight of the different motivations that produced the district under attack. Strict scrutiny is apparently required if the court concludes that the racial motivation was of greater importance to the State than its other motivations in drawing the district.

3. This Court's decision in *Shaw* does not support the district court's conclusion that a legislature's "predominant" intent to create a majority-minority district triggers strict scrutiny. This Court held in *Shaw* that a redistricting plan is subject to strict scrutiny if it is "so extremely irregular *on its face* that it rationally can be viewed only as an effort to segregate the races for the purposes of voting." 113 S. Ct. at 2824 (emphasis added). The Court repeated that standard several times in its opinion in *Shaw*; each time the opinion unequivocally stated that the inquiry was a facial one. See *id.* at 2824, 2825, 2826, 2828, 2829, 2832. An inquiry into the characteristics of a statute "on its face" plainly requires more than a determination of whether the legislature intended—or "predominantly" intended—to achieve a desired result.

4. *Shaw*'s limiting language correctly reflects the relevant constitutional values. Strict scrutiny is not appropriate merely because a legislature's "substantial or "motivating" intent—*i.e.*, the "most prominent element driving the legislature's planning," J.S. App. 35a n.10—was to create a majority-minority district. As we noted above, under the Equal Protection Clause, a State must be free to give the same consideration to the claims of racial minority groups that seek to influence redistricting as to

the claims of any other interest group. Indeed, the Constitution itself may require a State to take action to avoid the consequences of racial discrimination under the Fourteenth and Fifteenth Amendments. The fact that a State strongly desires to create a particular district with a majority-minority population says nothing about whether the State has taken action that amounts to a special preference for that group. For the State may have an equally strong desire to accommodate other ethnic, religious, political, or other interest groups by drawing lines that accommodate them in other districts. See *Hays* U.S. Br. 15-17. It is therefore not the strength of the State's desire to create a district for a racial minority group that is important, but whether the State has taken action that gives a special preference to that group that it is unwilling to give to others who are similarly situated.

The district court's analysis is also inconsistent with the principle that state action violates the Equal Protection Clause only if it has discriminatory consequences. In *Shaw*, this Court identified two potential injuries that were of concern in this area: the conveying of a message that all members of a particular racial group, regardless of where they live and what other characteristics they may have in common, "think alike, share the same political interests, and will prefer the same candidates at the polls," 113 S. Ct. at 2827, and the likelihood that elected officials from the district in question would be "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.* Because this is "one area in which appearances do matter," *ibid.*, those injuries may flow from a district whose extraordinary appearance advertises that the legislature was according special treatment to members of a minority group that it would not give to others similarly situated. Those injuries are unlikely to flow, however, from the fact that the legislature, in drawing a district that comports with its traditional, legitimate districting practices, strongly desired to accommodate the interests of a racial minority group, in the

same way as it accommodates the interests of other groups that attempt to influence legislative districting decisions. See *Hays* U.S. Br. 17-18.

5. The district court's standard disserves other important values as well. In some instances, States are required by Sections 2 or 5 of the Voting Rights Act to draw reasonably compact majority-minority districts. In such situations, a State's desire to draw a majority-minority district may naturally be an "overriding" or "predominant" motive. Under the district court's analysis, however, that would virtually ensure that the State's proper desire to comply with federal law subjects the resulting redistricting plan to strict scrutiny. See *Hays* U.S. Br. 18-19.

The district court's standard is also unworkable. In other contexts, the Court has rejected judicial inquiry into whether "a particular purpose," out of many that may have motivated a "legislature or administartive body operating under a broad mandate" to make a decision, "was the 'dominant' or 'primary' one." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). That is because "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). "The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained." *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973) (citation omitted).

The inquiry into which of many different legislative purposes underlying a particular act is "overriding" or "predominant" is particularly indeterminate in the case of redistricting plans. Where a legislature is forced to choose between advancing two different purposes, a court may fairly infer which was more important from the choice the legislature made. But where the legislature may accomplish a number of different compatible goals by enacting a particular redistricting plan with a reasonably compact majority-minority district, a court has no guidepost by which to determine the relative weights of

the various goals the legislature was attempting to achieve. Moreover, looking at a single district in isolation necessarily distorts the inquiry. As Judge Edmondson recognized in his dissenting opinion, because "apportionment is a highly political process * * * [m]any different agendas may be at work." J.S. 94a n.2. An accommodation to some faction's interests in one part of the plan may be essential to that faction's support of some other part of the plan. To attempt to determine the "substantial or motivating," "overriding," "predominant," or "most prominent" motive in redistricting will often be a futile and quixotic task. *Id.* at 35a & n.19.[6]

The technique for determining "predominant" motivation adopted by the district court here was to rely on the after-the-fact testimony of some of the legislators who had been involved in the districting process. J.S. App. 49a-50a. The testimony of an individual legislator about the legislature's "dominant" motive in enacting legislation, however, is not a reliable indicator of legislative intent. See, *e.g.*, *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). As Judge Edmondson pointed out, that is particularly true where the individual legislators' statements are made after the enactment of the statute in question. J.S. App. 94a n.2; see also *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990); *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989).

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[6] There was substantial and largely undisputed evidence at trial that the Eleventh District itself, from its inception, was the product of a host of political and other motivations. See pp. 6-7, *supra*. The district court did not make any findings to the contrary.

B. Georgia's Eleventh District Is Not So Highly Irregular On Its Face That It Can Be Understood Only As An Effort To Segregate The Races For Purposes Of Voting

The district court also subjected the State's plan to strict scrutiny on the ground that it appears "uninfluenced by accepted districting principles, as evidenced by its shape." J.S. App. 41a. The court erred in reaching that conclusion.

1. In our brief in *Hays*, we identified four legal principles that we believe should guide the inquiry into whether a district is so highly irregular on its face that it can be understood only as an effort to segregate the races for purposes of voting. First, the manner in which the State has drawn and continues to draw other districts is the most appropriate benchmark for determining whether a particular majority-minority district is "bizarre." Second, a district is suspect under *Shaw* only if it departs dramatically from the State's traditional districting practices. Third, the *Shaw* "on its face" inquiry mandates an objective inquiry into the nature of the district, not a subjective inquiry into the legislature's intent. Fourth, since the relevant inquiry under *Shaw* is whether the *district* as a whole is "bizarre," the fact that isolated segments of a district are irregular does not make the district itself bizarre. See *Hays* U.S. Br. 21-22. These same principles should guide the inquiry in this case.

2. Application of these legal standards leads to the conclusion that the Eleventh District is not "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

The appearance of the Eleventh District on a map comports reasonably with Georgia's ordinary districting practices. The district's shape is largely based on a core area in the central and eastern portions of Georgia. The district generally occupies an area similar in shape to, but

south of, the former Tenth District, which also spanned the central part of the State from Augusta to the Atlanta suburbs. The district's land area is about the State's average.[6]

The Eleventh District satisfies Georgia's own districting guidelines. Those guidelines provided that "efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts" and that "consideration may be given to avoiding contests between existing incumbents." J.A. 75 (Senate), 68 (House). They also counseled against unnecessary splitting of precincts. J.A. 75-76 (Senate), 68-69 (House). The State's guidelines do not mention "compactness" as a criterion.

The Eleventh District shows substantial respect for political subdivision boundaries. Cf. *Shaw*, 113 S. Ct. at 2826, 2827 (recognizing importance of this factor); see also J.S. App. 96a (Edmondson, J., dissenting). Of the 22 counties in the Eleventh District, 14 are intact and eight are divided. That puts the Eleventh District at about the state average in divided counties. By contrast, of the five counties in the Sixth District, none are intact and of the four counties in the Fourth District, only one is intact.[7]

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[6] The district spans 6,784 square miles. The First, Second, and Eighth Districts each encompass more than 10,100 square miles. The Ninth district has an area of 5,800 square miles and the Tenth District has an area of 5,100 square miles. State Exh. 177, at 4. In past plans, the State has drawn many districts of similar size. See J.A. 78, 79, 80, 81 (maps).

[7] The First District has 20 intact counties and parts of 2 others. The Second District has 24 intact counties and parts of 11 others. The Third District has 8 intact counties and parts of 8 others. The Fifth District is composed of parts of 4 counties. The Seventh District has 10 intact counties and a part of 1 county. The Eighth District has 22 intact counties and parts of 10 others. The Ninth District has 19 intact counties and a part of one other. The Tenth District has 16 intact counties and parts of three others. The figures are derived from Joint Exhibit 17.

Seventy-one percent of the boundaries of the Eleventh District follow the lines of political subdivisions. Of the State's 11 districts, five score lower than the Eleventh District on that measure and five score higher.[8] Eighty-three percent of the geographic area of the district lies within intact counties, above average for the State's congressional districts.[9] J.S. App. 96a-97a.

Georgia has frequently drawn districts that cover a substantial east-west or north-south portion of the State, as does the Eleventh District. The Ninth District, for example, covers the State's entire northern border. See J.A. 51 (map). The First, Second, and Eighth Districts all begin at the Florida border and extend north past the center of the State. See *ibid.* In the 1980's, the Eighth District extended even farther, from the southeast border with Florida in a rather irregular pattern almost to the Atlanta suburbs. See J.A. 80 (map).

3. The district court approached the question of whether the district was "bizarre" by assuming that the purpose of the inquiry was to uncover whether the State had an "overriding objective to include minority populations in the Eleventh [District]." J.S. App. 47a. As we argue above, that is not the proper focus of the *Shaw* analysis. The district court's improper focus led it to give inappropriate significance to several factors.

For example, the district court repeatedly emphasized that African-Americans formed a larger percentage of the population of the Eleventh District (64.07%) than of

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[8] The district with the lowest score on that measure is the Sixth, only 45% of whose boundaries follow political subdivision lines. The highest district on that measure is the Ninth, with a score of 91%. State Exh. 177, at 3.

[9] Only three districts—the First, Seventh, and Ninth—score higher than the Eleventh District on that measure. Excluding the Fifth and Sixth Districts, which contain no intact counties, the scores on that measure range from about 30% for the Fourth District to 97% for the Seventh District. State Exh. 177, at 4.

the State as a whole (26.96%), J.S. App. 46a, and that the portions of the Eleventh District in Chatham, Richmond, and DeKalb Counties had a larger percentage of African-American population than did those counties as a whole.[10] See J.S. App. 43a, 45a-46a. Those facts certainly tend to prove a fact that was stipulated in this case: that "race was a significant consideration in the configuration of the Eleventh Congressional District, including being a consideration in the inclusion of certain portions of DeKalb County, the City of Augusta [Richmond County], and the City of Savannah." J.A. 21-22. But they are not in the least probative on the issue of whether the district's shape is a dramatic departure from the State's ordinary districting practices.

The district court also discounted the evidence that the Eleventh District's boundaries largely follow precinct lines, on the ground that "[the State] designed the Eleventh District along racial lines, and race data was most accessible to [the State] at the precinct level." J.S. App. 44a. The State's own guidelines, however, provided that "[l]ocal voting precinct boundary lines should serve as the basic district building block in order to minimize voter confusion and cost of election administration." J.A. 68-69 (House), 75 (Senate). The fact that the State generally followed that neutral and traditional districting criterion in drawing the Eleventh District tends to show that the District's lines do *not* mark a dramatic departure from the State's own districting criteria.

4. The district court also believed that the configuration of the Eleventh District in the areas of Savannah (Chatham County), Augusta (Richmond County), and the Atlanta suburbs (DeKalb County) was sufficiently irregu-

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[10] African-Americans are 38% of the population of Chatham County, 42% of the population of Richmond County, and 42.2% of the population of DeKalb County. The portion of the Eleventh District in Chatham County is 84% black, the portion in Richmond County is 66% black, and the portion in DeKalb County is 74.6% black. J.S. App. 43a, 45a-46a.

lar to trigger strict scrutiny. J.S. App. 42a-43a, 45a-46a. In our view, the irregularities of the district's lines in those areas are insufficient to trigger strict scrutiny. This Court explained in *Shaw* that strict scrutiny is reserved for those "rare" plans, 113 S. Ct. at 2825, that create districts that are "extremely irregular" or "bizarre," 113 S. Ct. at 2824, 2825. The fact that the Eleventh District's lines are irregular in certain isolated areas is insufficient to support a finding that the district's shape is, on the whole, "bizarre."

Moreover, even when viewed in isolation, the boundaries in those urban and suburban areas are not "bizarre." For example, in DeKalb County, the Eleventh District essentially comprises the entire southern portion of the county; on the east, south, and west, the district lines are largely coterminous with the county lines.[11] Similarly, in the cities of Augusta and Savannah, the district includes identifiable portions of the cities and its lines largely follow precinct lines that themselves follow political boundaries, such as those of state legislative districts, and major landmarks, such as main streets and highways.[12] Even if the Court were to conclude that the boundaries in isolated areas of the district are "bizarre," the boundaries were determined by numerous political factors and are therefore explainable on grounds other than race. See *Shaw*, 113 S. Ct. at 2825; see pp. 6-7, *supra*. The district court disregarded that evidence.

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[11] Linda Meggers, the State's demographer, testified that the district lines in DeKalb County followed I-285 and the Stone Mountain Freeway. 2 Tr. 200. The northern boundary is largely governed by the borders of the cities of Atlanta, Decatur, and Avondale Estates. 2 Tr. 197, 199-200.

[12] See, *e.g.*, 2 Tr. 128 (major roads and landmarks generally used), 215 (major roads), 224 ("local visible boundaries"); 4 Tr. 177 (state legislative district).

II. THE ELEVENTH DISTRICT SATISFIES STRICT SCRUTINY

Even if the district court were correct in subjecting the Eleventh District to strict scrutiny, the court erred in concluding that strict scrutiny was not satisfied. The State's plan, including the Eleventh District, was narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effect that historic discrimination and persistent racial polarization have on the opportunities of minority voters to elect the candidates of their choice.

A. The State Had A Compelling Interest In Drawing The Eleventh District As A Majority-Minority District

1. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. The district court appeared to accept that principle, see J.S. App. 58a-59a, but went on to undertake a *de novo* consideration of whether Sections 2 and 5 required the creation of the Eleventh District. J.S. App. 66a-87a. The court concluded that neither Section 2 nor Section 5 provided a sufficient justification for the creation of three majority-minority districts in Georgia, and that the State accordingly had no compelling interest in creating the Eleventh District as a majority-minority district.

As we explained in our brief in *Hays,* the district court's approach is mistaken. See *Hays* U.S. Br. 27-28. In order to invoke the Voting Rights Act as a justification, it need not be shown that the Act required the drawing of a third majority-minority district. Rather, it need only be shown that there was a "strong basis in evidence" for the State's actions—a standard that is satisfied if there was a sound basis for believing that the State's failure to draw a third majority-minority district would have led to a prima facie case against it under either Section 2 or 5 of

the Voting Rights Act. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 652-653 (1987) (O'Connor, J., concurring in the judgment).

a. *Section 5.* The State had a sound basis for concluding that the creation of a third majority-minority district was necessary to comply with Section 5. Section 5 forbids a jurisdiction from implementing a redistricting plan unless it can show that the plan has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. 1973c. No party in this case argued that Georgia had to create a third majority-minority district in order to satisfy the retrogression criterion embodied in Section 5's "effect" prong. See *Beer* v. *United States*, 425 U.S. 130 (1976). Even when a redistricting plan is not retrogressive, however, a State cannot obtain preclearance unless it makes the further showing that the plan is free of discriminatory purpose. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469, 471 & n.11 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975); *Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). Therefore, the question is whether the State had a strong basis in evidence for believing that it would not be able to prove the absence of a discriminatory purpose if it failed to draw the third majority-minority district.

(i). Instead of undertaking that inquiry, the district court inquired into whether the State's failure to draw the third majority-minority district would, in the court's independent judgment, have violated Section 5. That is not the appropriate legal standard. As we argued in our brief in *Hays*, the benefits Congress ought to achieve in providing for administrative preclearance under Section 5 would be

lost if the States could not generally rely on the Attorney General's "administrative finding" of discrimination. *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). See *Hays* U.S. Br. 31-32. Given the Attorney General's important role in the Section 5 statutory scheme, a State should be able to act on the assumption that the Attorney General has correctly objected to its plan, unless the objection is clearly insupportable. *Shaw* v. *Hunt*, 861 F. Supp. 408, 443 & n.34 (E.D.N.C. 1994); *see UJO*, 430 U.S. at 175 (Brennan, J., concurring in part) (Attorney General's judgment that a particular districting scheme complies with the remedial objectives of the Voting Rights Act is entitled to "considerable deference"); cf. *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (court must defer to Attorney General's construction of Section 5, unless unreasonable or contrary to congressional intent).[13] A State should not generally be required, before it can respond to the Attorney General's objection, to expend substantial time and resources (and to delay its redistricting process by what may be a period of years) litigating the validity of the Attorney General's objection in a judicial preclearance action in the District Court for the District of Columbia. See also *Morris* v. *Gresette*, 432 U.S. 491, 504-505 (1977) (Attorney General's Section 5 objection not reviewable).

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[13] Jurisdictions often have to act particularly quickly—and thus to rely on the administrative preclearance process—in the redistricting context. Between 1991 and 1994, the Attorney General received administrative submissions seeking Section 5 preclearance for more than 2700 redistricting plans. During that same period, only eight declaratory judgment actions were filed seeking preclearance for redistricting plans. The Attorney General made merits determinations regarding 2438 redistricting plans between 1991 and 1994, and precleared all but 183 (or 7.5%) of them. During the comparable period in the last decade, the Attorney General made determinations concerning 1373 redistricting plans and objected to 113 (or 8.2%) of them.

(ii). In this case, the Attorney General interposed Section 5 objections to each of the State's two previous redistricting plans, on the ground that the State had failed in each case to carry its burden of showing that it had not acted with a discriminatory purpose in drafting those plans. See pp. 4-7, *supra*. Accordingly, so long as it could not be said that the Attorney General's objections were clearly insupportable, the State was justified in relying on the objections in concluding that it must draw a third majority-minority district.

Here, the Attorney General's objections were in fact well founded. First, as the district court noted, Mark Cohen, a Senior Assistant Attorney General of Georgia, see J.S. App. 10a, testified that "the circumstances of the 1991-92 redistricting were similar to those of 1981-82," *id.* at 20a n.11, when the district court, in a decision subsequently affirmed by this Court, denied the State's request for a declaratory judgment that its redistricting plan was not motivated by a discriminatory purpose. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).[14] The district court did not challenge that conclusion. J.S. App. 20a-21a n.11.[15] Indeed, in 1981-1982, as here, the legislature had applied its purported districting principles selectively. See *Busbee*, 549 F. Supp. at 514. In addition, in both 1981-1982 and the

[14] Cohen had also represented the State in the *Busbee* litigation. He testified at trial in this case that he had thought it likely that the State would lose a Section 5 suit to preclear either of the plans to which the Department of Justice had objected. 5 Tr. 5.

[15] The district court added that "the cost of litigating in D.C. and the time pressures on the Assembly" also were factors making a declaratory judgment action "not likely." J.S. App. 20a-21a n.11. The cost of litigation is always a disincentive. A State ought not be required to undergo those costs and litigate what it reasonably believes might be a futile lawsuit in Washington, rather than accepting the Attorney General's objection and taking remedial steps to cure it.

1991-1992 round of redistricting, the state Senate had passed a plan that would have remedied the identified discrimination, while the state House refused to do so. *Id.* at 504-512. The fact that the State had been unable to prevail in a Section 5 declaratory judgment action when it had previously faced a similar Section 5 "purpose" objection from the Attorney General strongly supported its conclusion that it was unlikely to prevail in this case.

There were also other factors supporting the conclusion that the State might not be able to establish that it acted without a discriminatory purpose had it not created a third majority-minority district. This Court has explained that the "historical background of the decision," especially if it reveals a "series of official actions taken for invidious purposes," *Arlington Heights*, 429 U.S. at 267, militates in favor of an inference of intent. The district court judicially noticed the State's history of racial discrimination in voting, see J.S. App. 103a-104a, which included "various means of destroying or diluting black voting strength" and which spanned the period from the State's first Constitution "through recent times." J.S. App. 104a. For example, "[c]ongressional districts have been drawn * * * to discriminate against black citizens," and the State's plans "discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts." *Ibid.* That history, which continued into the 1980's, when *Busbee* was decided, would have supported an inference of discriminatory purpose here.

Arlington Heights also teaches that departure from a jurisdiction's normal way of conducting its affairs can give rise to an inference of discriminatory intent. 429 U.S. at 267. The Section 5 objection letters referred to the fact that in passing its first two plans after the 1990 census, Georgia had departed from its own commitment to treat keeping counties and cities intact as a secondary interest. J.A. 106, 125. In each of the two plans, the

Sixth District, for example, contained no complete counties and parts of five others. The testimony was unequivocal that the Sixth District's odd configuration reflected political, not racial, purposes. The plans thus exhibited the State's willingness to split political subdivisions to serve partisan political ends, but an unwillingness to do so to recognize black minority political interests. Such inconsistent application of substantive criteria was noted by the Attorney General, J.A. 105-106, 125, and would have supported a finding that the State's avowed goal to avoid splitting counties was pretextual.

This Court recognized in *Arlington Heights* that "[t]he impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point" in the inquiry into intent. 429 U.S. at 266 (citation omitted). Similarly, in the voting rights context, this Court held in *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982), that the "overwhelming evidence of bloc voting along racial lines" and the fact that "no black had ever been elected to [the legislative body in question]" were facts that "bear heavily on the issue of purposeful discrimination." As we discuss below, see p. 37, *infra*, there was very substantial evidence of racial bloc voting in this case. There was also evidence that black candidates had in the past virtually never been successful when they ran from majority-white districts and that blacks would consequently be significantly underrepresented in the State's congressional delegation if only two majority-minority districts were created. The State thus knew that its failure to create a third majority-minority district could be viewed as having an adverse impact on minority voters, and that that fact would be of relevance in a purpose inquiry.

A straightforward application of the principles for analyzing discriminatory purpose therefore supported the Attorney General's conclusion that the State had not met its burden of showing that its reasons for not drawing

a third majority-minority district were not pretexts for minimizing black voting strength. The State's compelling interest in complying with Section 5 therefore justified its decision to draw a plan with three majority-minority districts.

(iii). In connection with its inquiry into the Section 5 issues in this case, the district court permitted respondents, over our objection, to obtain discovery and to introduce extensive testimony concerning the operation of the Section 5 preclearance process in this case. That evidence included the live testimony of one DOJ attorney who was involved with the Section 5 process and the testimony by deposition of another DOJ attorney and former Assistant Attorney General Dunne.

We continue to believe that that inquiry should not have been undertaken. The Assistant Attorney General and his staff received numerous communications from many individuals interested in the Georgia redistricting process —including numerous communications from attorneys representing the state legislative black caucus and its members. See J.S. App. 9a-11a, 19a-20a, 26a-27a. The governing DOJ regulations provide that any information received from any individual or group "shall be considered along with the materials submitted [by the jurisdiction] and materials resulting from any investigation." 28 C.F.R. 51.30(a).[16] Such consideration was accorded in this case, and nothing in the district court's opinion suggests otherwise.[17]

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[16] The regulations provide that "[a]ny individual or group may send to the Attorney General information concerning a change affecting voting." 28 C.F.R. 51.29. Such information may be provided "at any time." 28 C.F.R. 51.29(c). It is important that the Assistant Attorney General be able to consider such information, since he has only 60 days from the submission of a voting change to determine whether it should be precleared. 42 U.S.C. 1973c.

[17] The district court adverted to one general practice that it disagreed with: the Department's practice of respecting the ano-

The district court acknowledged that "the motivations of the State of Georgia are the legally relevant motivations in this case, and not those of the ACLU or the DOJ." J.S. App. 9a. That statement was correct as to the analysis of the State's interest in complying with Section 5, and the inquiry into DOJ procedures and the thought processes of individual DOJ attorneys had nothing to do with any issue properly before the court.

The only respect in which the court's inquiry into the Section 5 process arguably could affect the court's ruling on the merits in this case was the court's conclusion that the Department had adopted a "maximization" policy that required the State to draw as many majority-minority districts as possible. See J.S. App. 64a. The court's characterization of the Attorney General's policy and practice is, however, inaccurate. The Section 5 process is tailored to the specifics of each case, and no general requirement of maximization—or of proportionality—is imposed.[18]

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nymity of its sources when requested, pursuant to regulation. See 28 C.F.R. 51.29(d). We believe that that practice is sound, especially considered in light of the history of voting rights enforcement in this country. The district court also suggested that a state Senator was "offended" at a meeting with DOJ officials, either because of "anonymous allegations," of which he was presumably informed, "or some other suggestion." J.S. App. 24a. The fact that an individual felt "offended" for an undetermined reason at a meeting at which highly controversial issues were discussed hardly suggests misconduct on the part of any DOJ official.

The court also criticized the Department for what it believed to be a "leak" of the Department's second objection to the legislative black caucus before the State itself was informed. J.S. App. 26a. Any such "leak" would have been in direct contravention of the Department's policy and should not have occurred. The issue, however, has nothing to do with the merits of the present case.

[18] See James P. Turner, "Case-Specific Implementation of the Voting Rights Act," in Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting* (The Brookings Institution, Washington, D.C. 1992); Dunne, *Redistricting in the 1990s: The New York Example*, 14 Cardozo L. Rev. 1127 (1993); Grofman,

See 28 C.F.R. 51.57 *et seq.* (standards by which Section 5 submissions are judged). Providing the opportunity for minority representation is of course considered as a relevant factor in the Section 5 process; here, three majority-minority districts out of 11 was almost exactly proportional to the number of minority group members in the population. See J.S. App. 68a. As this Court explained in *Johnson* v. *DeGrandy*, 114 S. Ct. 2647 (1994), "proportionality" in that sense—*i.e.*, the relationship between the number of majority-minority districts and the minority's percentage of the population—is "obviously" of relevance to a Section 2 claim, 114 S. Ct. at 2661, 2662 & n.17, and as the Court explained in *Arlington Heights*, see p. 33, *supra*, evidence of such discriminatory effects as underrepresentation is also relevant to a claim of discriminatory purpose.

b. *Section 2.* In *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the Court established the three preconditions for a Section 2 vote dilution claim in a districting case. Plaintiffs must show that (1) the minority population is sufficiently numerous and compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. As we explained in our brief in *Hays*, see *Hays* U.S. Br. 28-29, in light of *Gingles* and this Court's decision in *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994), a State would have a reasonable basis for creating a majority-minority district to comply with Section 2 when each of the three *Gingles* preconditions could be established against it and when, without such a district, the number of districts in which minorities would have an opportunity to elect candidates of choice would be disproportionately small compared to the group's proportion of the population. See also *Johnson*, 114 S. Ct. at 2664

Would Vince Lombardi Have Been Right If He Had Said: "When It Comes To Redistricting, Race Isn't Everything, It's The Only Thing"?, 14 Cardozo L. Rev. 1237, 1265-1266 (1993).

(O'Connor, J., concurring); *Shaw* v. *Hunt*, 861 F. Supp. at 440-441 & n.28.

The State had reason to know that voting in Georgia could be found to be polarized on the basis of race, and the district court in this case in fact found that it was.[19] The court found that only 22% to 38% of white people in the area were willing to vote for African-American candidates, while only 20% to 23% of African-Americans in the area would vote for white candidates.[20] J.S. App.

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[19] The parties stipulated that courts had previously found racially polarized voting in elections in Bleckley, Burke, Carroll, Colquitt, Dougherty, Fulton, Putnam, Wilkes, and DeKalb Counties. Joint Statement of Undisputed Facts, at 29-30.

[20] The district court found that racially polarized voting "exists," although the court characterized it as "not in alarming quantities." J.S. App. 82a. The court's assessment of the significance of the fact that the white crossover vote ranged from 22% to 38%—*i.e.*, that about 70% of the white voters would not vote for candidates of choice of the black community—is doubtful. In any event, the district court substantially overestimated the white crossover vote, and the State had a strong basis for believing that the crossover vote was much smaller. Dr. Allan Lichtman, the United States' expert, using Democratic primary elections including primary elections for Congress in the Second and Eleventh Districts, found that white cross-over voting ranged from 7% to 29%, except in elections having multiple black candidates. 5 Tr. 202-224; U.S. Exh. 24, tables 1-4. Dr. Ronald Weber, plaintiffs' expert, agreed that Democratic primaries were the most "probative" elections, although he believed that other elections were relevant as well. 4 Tr. 314, 318, 286-290. Moreover, the figure cited by the district court includes consideration of judicial elections involving an appointed black incumbent and elections in which there were multiple black candidates and a white candidate, both of which are substantially less probative of racially polarized voting in congressional elections between one black and one white candidate. See 5 Tr. 201 (testimony of Alan Lichtman). See also *Thornburg* v. *Gingles*, 478 U.S. 30, 57 (1986); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Dr. Weber himself testified that, if the judicial incumbent elections were removed from his own calculation, the white crossover vote would drop to 26.6%, and if the elections involving multiple black candidates were removed, the white crossover calculation would drop to 17%. 4 Tr. 325.

82a. The State also knew that, with one exception, all of the black state legislators in Georgia were elected in districts that were at least majority black and, more often, at least 60% black. See docket no. 62, at 19. Indeed, of the 181 majority-white state legislative districts, only one was represented by an African-American. *Ibid.* As for "compactness," nothing in *Gingles* requires any absolute measures. That case requires only that the potential majority-minority district be reasonably compact in light of the state's redistricting practices. As we have argued above, the Eleventh District satisfied that criterion. See pp. 23-25, *supra.* Finally, had the State created only two majority-minority districts out of eleven (or 18%), the State had reason to believe that the opportunities for minority voters, who constitute 27% of the State's population, to elect candidates of their choice would have been disproportionally small.

Respondents have argued that, because the State itself has not advanced an interest in complying with Section 2 as a justification for the Eleventh District, no such interest could be recognized. That is incorrect. The critical inquiry is whether the objective facts considered by the State at the time of redistricting would have reasonably supported a conclusion that a prima facie case existed under Section 2. The failure of the state defendants to argue that the State was in danger of violating Section 2, especially where the State was litigating similar issues in other cases, does not preclude a finding that the State's need to ensure compliance with Section 2 was a compelling interest sufficient to support its determination to create a third majority-minority district. The State is not required to expose itself to liability in other settings in order voluntarily to comply with the Voting Rights Act with regard to redistricting.[21]

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[21] Both at the time of redistricting and when trial was held in this case, Georgia was defending Section 2 challenges to its majority vote requirement and its at-large system for electing judges. *Brooks* v. *Miller*, Civ. No. 1:90-CV-1001-RCF (N.D. Ga.) (majority-

c. *Ameliorating Polarization.* A State may also have a compelling interest, independent of the Voting Rights Act, in eradicating the effects of past discrimination, which have resulted in racially polarized voting and a diminution of the opportunities of minority voters to elect the candidates of their choice. See *Hays* U.S. Br. 33-34. That interest was recognized by three Justices in *UJO*. See 430 U.S. at 167 (White, J., joined by Rehnquist and Stevens, JJ.). It also follows from the general principle, recognized by this Court in *Croson*, that a State has a compelling interest in remedying identified discrimination within its jurisdiction, even when it has no federal statutory duty to do so. 488 U.S. at 491-493, 509.

Applying that analysis leads to the conclusion that polarized voting in Georgia gives the State a compelling interest in creating a plan with three majority-minority districts. As we have noted, racially polarized voting in Georgia virtually precludes the election of black-supported black candidates in majority-white districts. Based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect an additional representative of their choice and would leave them substantially underrepresented. In those circumstances, the State had a compelling interest in creating three majority-minority districts in an effort to achieve a fair allocation of political power between white and nonwhite voters.

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vote requirement); *United States* v. *Georgia*, Civ. No. 1:90-CV-1749-RCF (N.D. Ga.) (same); *Brooks* v. *State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994) (judicial elections). Following Section 5 objections by the Attorney General, Georgia also was seeking judicial preclearance to expand its at-large judicial election system. *Georgia* v. *Reno*, No. 90-2065 (D.D.C.) (three-judge court). The State was well aware that any concession of racial polarization for redistricting purposes could adversely affect its position in ongoing voting rights litigation.

The district court rejected this interest on the ground that proportional representation is neither a statutory nor a constitutional requirement, and on the ground that "[t]o erect the goal of proportional representation is to erect an implicit quota for black voters." J.S. App. 53a. We agree that proportionality is not a statutory or constitutional requirement. But we disagree that a State's desire to ameliorate the effects of severely racially polarized voting would necessarily constitute a "quota." Where the State attempts to achieve its goal through means that are narrowly tailored, the result is not a "quota" for minority voters, but a fair opportunity for them to elect the candidates of their choice. *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658 n.11 (1994).

B. The State's Plan Is Narrowly Tailored To Further Its Compelling Interests

The State's plan was also narrowly tailored to further its compelling state interests. Relying on *United States* v. *Paradise*, 480 U.S. 149, 171-185 (1987) (plurality opinion), courts have focused on three narrow tailoring requirements in the redistricting context. First, a State may not create more majority-minority districts than either the Voting Rights Act or the State's interest in fairly allocating political power justifies. *Shaw* v. *Hunt*, 861 F. Supp. at 446; J.S. App. 82a. Second, a State may not needlessly pack substantially more minority voters into a district than are reasonably necessary to give the minority group an opportunity to elect the candidate of its choice. *Ibid.* And third, a State may not create an extremely irregular district when a far more regular district would be equally effective in serving the State's compelling interest and the creation of the more compact district would not compromise the State's other legitimate redistricting interests.[22] *Hays* v. *Louisiana*, 839 F. Supp.

[22] The narrow tailoring principle does not require a State to draw the most compact district possible. See Jurisdictional Statement,

1188, 1206-1209 (W.D. La. 1993), vacated on other grounds, 114 S. Ct. 2731 (1994).

The district court did not find that the first and third of those criteria were not satisfied here, and the record would not have supported any such finding. The district court did find, however, that the State's plan was not narrowly tailored because the African-American share of the Eleventh District's population was too high. J.S. App. 63a-87a. According to the district court, "a black candidate in Georgia would have an 'equal' chance of being elected in a district containing 45-50% black registered voters." J.S. App. 86a. As drawn, the district was 64% African-American in total population and 60% African-American in voting age population. J.S. App. 21a n.12. Based on official voter registration data, at the time of the redistricting, the district was estimated to have been 51.1% African-American in registered voters. Joint Exh. 17, at 67.[23] The district court's finding that the proportions were excessive was based on two erroneous legal premises.

First, the district court took the position that the proportionately lower registration and turnout rates of African-American voters should not be figured into the calculation. To consider those factors, the court held, would "amount[] to an incentive for and institutionalization of black voter apathy." J.S. App. 86a. Both this Court and other courts addressing the issue, however, have held that past discrimination and socioeconomic disadvantage may suppress voter turnout and registration among African-Americans. *Gingles*, *supra*, 478 U.S. at 36, n.4 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982)), 38 (lower court found such disadvantage among North Caro-

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United States v. *Vera*, No. 94-988, at 11-14. A State may legitimately give priority to redistricting interests other than compactness, such as protecting incumbents.

[23] There was evidence that, by 1992, 57% of the registered voters in the district were African-American. See Defendants' Joint Exh. 21, at 139.

lina blacks), 69 (expressly endorsing the principle). See also *United States* v. *Dallas County Commission*, 739 F.2d 1529, 1537 (11th Cir. 1984); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1574 (11th Cir.), appeal dism. and cert. denied, 469 U.S. 976 (1984). Dr. Lichtman testified without contradiction in this case (5 Tr. 206-207) that those factors operate to depress black turnout in Georgia. See Joint Statement of Undisputed Facts, at 40-44. To ignore those factors in creating a majority-minority district would be to give continuing effect to the past discrimination that the State seeks to remedy.

Second, the district court apparently believed that a district cannot be justified as narrowly tailored if a court determines, after thorough litigation of the issue, that the district contains more minority population than the court finds would have been necessary to advance the State's compelling interest. At the time the State creates the district, however, the State must rely on available data, and the State certainly cannot be expected to predict with precision the determination that a court might make on the issue after it has been contested in litigation. The percentage of minority population necessary to give minority voters an opportunity to elect the candidates of their choice in a given district is necessarily a rough calculation, especially at the time of redistricting. The number the State used here—60% black voting age population—was supported by very substantial evidence in this case, see 5 Tr. 205-220, 279-283 (testimony of Allan Lichtman); U.S. Exh. 24, at 20-37, and is well within the range that has been thought appropriate in similar contexts. See, *e.g.*, *Ketchum* v. *Byrne*, 740 F.2d 1398, 1413-1417 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Jeffers* v. *Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990), aff'd mem., 498 U.S. 1019 (1991). Especially in light of the federal interest in encouraging voluntary compliance with the law, see, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277-278 (1986) (plurality opinion); *id.* at 290-291 (O'Connor, J., con-

curring in part and concurring in the judgment); *id.* at 305 (Marshall, J., dissenting), the State had a more than adequate basis for drawing the Eleventh District with the minority population it contained.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on acount of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to admin-

ister any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer

or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

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FOR ARGUMENT

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Nos. 94-631, 94-797 and 94-929

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, *et al.*,
Appellants

v.

DAVIDA JOHNSON, *et al.*,
Appellees

LUCIOUS ABRAMS, JR., *et al.*,
Appellants

v.

DAVIDA JOHNSON, *et al.*,
Appellees

UNITED STATES OF AMERICA,
Appellant

v.

DAVIDA JOHNSON, *et al.*,
Appellees

On Appeal from the United States District Court Southern District of Georgia (Three Judge Court)

BRIEF OF THE APPELLEES

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QUESTIONS PRESENTED

1. Whether Appellants have carried their burden of proving the District Court's determination that the Eleventh District is the product of racial gerrymandering is clearly erroneous?
2. Whether the legislation creating the Eleventh District is subject to strict scrutiny?
3. Whether the State abandoned any constitutional defense of the District by its failure to articulate any compelling state interest furthered by the intentional use of racial classifications in its creation?
4. Whether Intervenors may advance compelling state interests to purportedly justify racial gerrymandering where the State expressly denies it was so motivated?
5. Assuming the Court accepts one of the proffered rationalizations for the gerrymandering as a compelling state interest, whether the District Court correctly determined the Eleventh District can not survive strict scrutiny?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
Georgia's 1992 Redistricting Plan Creates Lines Which Are Exceedingly Irregular	3
Race Was the Overriding Consideration in Georgia's 1992 Congressional Redistricting Plan	6
Georgia's 1992 Redistricting Plan Makes a Mockery of Traditional Districting Principles	11
The DOJ and the Demand for Maximization	18
SUMMARY OF ARGUMENT	23
ARGUMENT	25
I. PLAINTIFFS HAVE STANDING TO CHALLENGE RACIAL GERRYMANDERING IN THEIR DISTRICT	25
II. THE DISTRICT COURT'S DETERMINATION THAT THE ELEVENTH DISTRICT IS THE PRODUCT OF RACIAL GERRYMANDERING IS NOT CLEARLY ERRONEOUS	29
A. Objective Criteria to Govern Application of Shaw Already Exist	32
III. THE LEGISLATION ESTABLISHING THE ELEVENTH DISTRICT IS SUBJECT TO STRICT SCRUTINY	33
IV. THE ELEVENTH DISTRICT CANNOT SURVIVE STRICT SCRUTINY	37
A. Third Parties Cannot Supply Compelling Governmental Interests Which The State Refuses To Acknowledge	37

TABLE OF CONTENTS—Continued

Page

B. The Lines of the Eleventh District Are Not Arguably Necessary Under Section 5 Of The Voting Rights Act 39

C. The Lines of the Eleventh District Are Not Arguably Necessary Under Section 2 Of The Voting Rights Act 43

D. The Desire To Redress The Unquantified Effects of Historical Discrimination Is Not A Compelling State Interest 46

CONCLUSION 50

TABLE OF AUTHORITIES

CASES — Page

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 34, 35, 36
Batson v. Kentucky, 476 U.S. 79 (1986) 28
Beer v. United States, 425 U.S. 130 (1976) 40
Brooks v. Mississippi, 469 U.S. 1002 (1984) 47
Brown v. Board of Education, 347 U.S. 483 (1954) 24, 28
Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982) 40
City of Rome v. United States, 446 U.S. 156 (1980) 30
City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) 27, 34, 38, 39
Evans v. Abney, 396 U.S. 435 (1970) 28
Gayle v. Browder, 352 U.S. 903 (1956) 28
Gomillion v. Lightfoot, 364 U.S. 339, 80 S.Ct. 669 (1960) 25, 35
Growe v. Emison, 113 S.Ct. 1075 (1993) 44
Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded*, 113 S.Ct. 2731 (1994) 26, 30, 33
Hernandez v. New York, 500 U.S. 352 (1991) 28
Holder v. Hall, 114 S.Ct. 2598 (1994) 32, 50
Holmes v. Atlanta, 350 U.S. 879 (1955) 28
Hunter v. Underwood, 471 U.S. 222 (1985) 35
Johnson v. DeGrandy, 114 S.Ct. 2647 (1994) 41, 49
Katzenbach v. South Carolina, 383 U.S. 301 (1966) 40
Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) 38
Loving v. Virginia, 388 U.S. 1 (1967) 28
Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) 28
Palmer v. Thompson, 403 U.S. 217 (1971) 28
Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed.2d 256 (1896) 25
Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) 38, 39
Rogers v. Lodge, 458 U.S. 613 (1982) 30
Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) 26, 30, 36

TABLE OF AUTHORITIES—Continued

Page

Shaw v. Reno, 113 S.Ct. 2816 (1993) ..... *passim*
Thornburg v. Gingles, 478 U.S. 30 (1986) ..30, 31, 43, 44
United Jewish Orgs. v. Carey, 430 U.S. 144 (1971) 46, 49
United States v. United States Gypsum Co., 333 U.S. 364 (1948) 31
Vera v. Richards, 861 F.Supp. 1304 (S.D. Tex. 1994) 26
Voinivich v. Quilter, 113 S.Ct. 1149 (1993) 37
Washington v. Davis, 426 U.S. 229 (1976) 36
White v. Register, 412 U.S. 755 (1973) 30
Wright v. Rockefeller, 376 U.S. 52 (1964) 25, 31, 34
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 27, 38, 39
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 31

CONSTITUTIONS

U.S. Const. amend. XIV (Equal Protection Clause) 1, 24, 34, 36, 38, 49

STATUTES

42 U.S.C. § 1973(a), § 1973(b), § 1973c ..... *passim*
Ga. Code Ann. § 21-2-3 (1993) 1

RULES

Federal Rules of Civil Procedure, Rule 52a 30

MISCELLANEOUS

Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633 (1983) 28
Aleinkoff and Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 589, n.8 (1993)..... 45
Brace, Grofman, Handley & Niemi, *Minority Voting Equality: The 65% Rule*, 10 Law & Policy (1988) 45

TABLE OF AUTHORITIES—Continued

Page

Brace, Grofman, Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. Pol. 69 (1987) 46

Grofman and Handley, *Black Representation Making Sense of Electoral Geography at Different Levels of Government*, 2 Legis. Stud. Q., XIV, 265 (1989) 48

BRIEF OF THE APPELLEES

STATEMENT OF THE CASE

This case presents the question whether the extreme racial gerrymandering embodied in the legislation establishing Georgia's Eleventh Congressional District violates the Equal Protection Clause of the Constitution. Applying this Court's decison in *Shaw v. Reno,* 113 S.Ct. 2816 (1993), the District Court found such a violation since race was the overriding consideration in the District's bizarre configuration and since the legislation creating these lines (O.C.G.A. § 21-2-3) was not narrowly tailored to further a compelling governmental interest.

Without acknowledging the standard of review applicable to the District Court's findings of fact, Appellants assail the decision from a variety of angles. The "State Defendants" (Defendants Miller, Howard and Cleland), concede the district was racially gerrymandered as defined in *Shaw, supra* at 2823 ("the deliberate and arbitrary distortion of distinct boundaries . . . for [racial] purposes"), but assert that the District's appearance is not sufficiently irregular or bizarre to come within the reach of *Shaw.*[1] The Appellant United States, acting through the Department of Justice ("DOJ") goes so far as to assert that "the appearance of the Eleventh District on a map comports reasonably with Georgia's ordinary districting practices." DOJ Brief, p. 23. Appellants collectively downplay race as but one of several considerations

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[1] One of the Defendants at trial, Speaker of Georgia's House of Representatives, the Hon. Thomas Murphy, reluctantly cast the tie-breaking vote in favor of the final Georgia plan. He stated at the time the State was engaging in racial gerrymandering because "what we did is went into counties and precincts and picked up pockets of African-Americans to make a strong district with voting age black population so that it would guarantee a black would be elected from there." Tr. II, 62. He characterized the District as resembling an "octopus." Tr. II, 63. Speaker Murphy did not appeal the decision of the District Court.

which affected the boundaries of the District, thus precluding relief.

These portrayals are, at best, advocacy. The lines of Georgia's Eleventh District are extraordinarily irregular by any honest reckoning. They are absolutely without precedent in the history of Georgia congressional redistricting. To contend that race did not drive the decision-making concerning the lines of the Eleventh District is to deny reality. Georgia's entire congressional districting scheme could not be more racialized than it is today. It is the epitome of what this Court decried in *Shaw*.

If one fact pervades this case, it is the fact that the 1992 redistricting plan does not remotely resemble what the Georgia legislature wanted. Georgia is subject to the preclearance requirements of Section 5 of the Voting Rights Act. Once Georgia chose not to seek a judicial stamp of approval for its redistricting—an extraordinarily difficult undertaking in March of an election year—its only option was to follow the mandate of the DOJ. If it refused, a federal court in Atlanta had already scheduled a hearing to draw the lines for the State by default. *See* note 22, *infra*.

The evidence presented at trial established beyond any doubt that the DOJ approached redistricting in Georgia with a specific mission. That mission was to maximize by whatever means necessary both the number of majority black congressional districts in the State and the percentage of black voting age population within these districts. The fact that the State's African-American population, other than in Atlanta, is widely and unevenly disbursed throughout the State south of Atlanta mattered not to the DOJ.[2] J.A. 130. The command was that blacks

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[2] Only 17 out of 159 counties in Georgia are majority black. They are largely rural and sparsely populated, representing only 7.2 percent of the State's total black population, according to the 1990 census. Over a third of these people reside in Dougherty County, in Southwest Georgia, where Albany is the county seat. Pl. Ex. 16A, at 123-24.

needed to be linked together with other blacks regardless of location, regardless of economics, regardless of voter confusion, regardless of literally anaything other than the constitutional requirement of one person one vote.[3]

Georgia's 1992 Redistricting Plan Creates Lines Which Are Exceedingly Irregular

Appellants go to significant lengths to make the Eleventh District appear somehow normal.[4] Staring Appellants in the face, however, are the lines themselves. The most cursory inspection by someone knowledgeable about Georgia's geography would reveal their extremely irregular character.

What defines the Eleventh District, both racially and geographically, is not its very sparsely populated center, but the serpentine appendages which dramatically spring from that center. One snakes along the Savannah River to select portions of the City of Savannah. Another hooks in a thoroughly confusing fashion through Richmond County and City of Augusta. Yet another runs like a thread through Henry County, where the District almost disappears, only to be reborn in select portions of DeKalb County adjacent to the City of Atlanta. Additional, odd

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[3] Even the one-person one-vote requirement was partially sacrificed at the alter of racial classification. In order to satisfy the DOJ's vision for the State, it was necessary to create an unsually high overall population deviation (.94). See O'Rourke Report, Pl. Ex. 85, at 2-3.

[4] It is apparent from media reports that the District is widely perceived as anything but "normal." An editorial in the Atlanta Journal describes the District as "grotesque." A Wall Street Journal editorial has described the District as "bizarrely shaped." The Augusta Chronicle has described it as a "crazy quilt." Along with congressional districts in North Carolina and Louisiana, it was featured in the July 12, 1993 issue of *Time* Magazine, and the lead story in the February 14, 1994 edition of the *New York Times*. Pl. Ex. 19-23. J.A. at 29 (Stip. 74). A widely-quoted reference source on congressional districts, the Almanac of American Politics 1994, refers to the District as a "geographic monstrosity." Tr. III, 105.

appendages are found in Wilkes, Baldwin and Twiggs Counties.[5]

The Eleventh District is not only shocking on this "macro" level. The fact that the District traverses almost the entire State at its widest part is only the beginning. In many locations, the lines are very difficult if not impossible to follow, even with a road map. Dr. Timothy O'Rourke, an expert retained by Plaintiffs, personally tracked the district lines in several areas. In Augusta, he testified the lines "will follow a major cross-town road for a couple of blocks and it will then veer into residential neighborhoods. It is a very difficult line to find. It certainly is not a line that is easily demarcated on a map. . ." Tr. III, 106. Overall, he found the lines were "not readily identifiable so that if you are a citizen and its not really clear to you—one could not easily explain to you if you were in the vicinity of a line whether you were in the district or out." Tr. III, 110. *See* Detail Map, O'Rourke Supp. Rpt., Pl. Ex. 85, at 3.

In Chatham County and the City of Savannah, Dr. O'Rourke observed similarly strange line configurations.

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[5] The use of appendages in Georgia's 1992 congressional redistricting legislation to create artificial districts driven by race is by no means restricted to the Eleventh District. The Second District also has numerous appendages along its borders, which methodically divide counties and cities in tortuous fashion. One protrusion meanders through Houston, Peach and Bibb Counties in a manner which resembles a tomato splat. J.A. 187-188. At its northern end, the Eighth District loops around the Second to take in the western portion of Bibb County. J.A. 62. The resulting configuration of the Second, Third, Eighth and Eleventh Congressional Districts in this area prompted Linda Meggers, Reapportionment Services Director for the Georgia General Assembly for more than twenty years, to observe: "It gets very hard to understand right there." Tr. I, 79. The Second Congressional District also includes portions of Meriwether County, taken in by means of a tiny pathway, which leaves that county divided into three segments, two of which are non-contiguous, but nevertheless included in the same congressional district. Defendant Lt. Governor Howard characterized what happened to Meriwether County as a "terrible thing—it was just emasculated in this process." Tr. IV, 218.

At the north end of the county, he found a "very, very narrow [land] bridge indeed" that was "not readilly accessible by roads on the maps" since it was swamp land within the Savannah Wildlife Refuge. Tr. III, 113-15. At one point inside the City of Savannah, the entire width of the district was between 2/10 and 3/10 of a mile. Tr. III, 113.

Extensive evidence was provided at trial to support Dr. O'Rourke's conclusion that "a tour of the Eleventh District confirmed what the maps of the district only begin to suggest: that the lines of the district are, in many places, jagged and haphazard, difficult to follow, barely contiguous and plainly noncognizable." Pl. Ex. 85, at 8-9 (Detail Maps).[6]

The grossly irregular lines of the Eleventh and Second Districts create very strange features in the Third and Eighth Congressional Districts as well. The Third District is "hollowed out" by virtue of the intrusion of the Second into Meriwether County. The Eighth District has an almost indecipherable western edge, directly caused by numerous gossamer appendages from the Second. Absent a large detail map. the Eighth District appears to be completely dissected in Bibb County. J.A. 62.

While the lines of the Eleventh District are extraordinary in absolute terms, they are even more so when viewed in light of where the population of the district is located. The portion of DeKalb County in the Eleventh District alone constitutes 35.3% of the district's total population. The excised portions of DeKalb, Richmond, Chatham and Baldwin Counties account for nearly 70% of the district's population. Pl. Ex. 24.

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[6] The difficulty in ascertaining where the lines of the district are located has prompted the office of the present U.S. Representative for the Eleventh District to contact Georgia's Legislative Reapportionment Office for more detailed maps. The reason that staffers provided for the inquiry was "we can't figure out what's ours." These requests have continued even after the representative had been in office for almost two years. Tr. II, 34.

Of the 18 "other" counties (or parts thereof included in the Eleventh Congressional District), not one has a population constituting more than 3.5% of the entire district. Indeed, 12 have a population constituting 2% or less of the district's total. The portion of DeKalb County included in the Eleventh District *by itself* represents 4.1% more of the district's total population than all of these 18 counties put together. J.A. 131.

Race Was The Overriding Consideration In Georgia's 1992 Congressional Redistricting Plan

By placing demographic information over the lines established in Georgia's 1992 Congressional Redistricting Plan, it is immediately apparent that race dominated the 1992 Georgia Congresional Redistricting Plan in general, and the Eleventh and Second Congressional Districts in particular. Indeed, it is quite apparent that the Eleventh District is not a district at all in the conventional sense. It is nothing but an amalgam of distantly located concentrations of black population located at the end of racially gerrymandered appendages attached to a thinly populated rural center. By means of these computer generated racially gerrymandered appendages, the district is transformed into one which is almost 65% black.

The demographic heart of the population of the Eleventh District is split amongst portions of three distant counties, DeKalb, Richmond and Chatham. They account for almost two-thirds of the total population and more than 73.7% of the black population of the entire district. J.A. 131. No one can seriously deny that these areas were brought into the Eleventh District for purely racial reasons, and that the "land bridges" used to reach them exist to avoid including more whites in the district.

The statistics respecting these three counties are simply overwhelming. DeKalb County as a whole is 42.2% black. Yet, on the Eleventh District side of the line, 74.6% of the population is black. On the other side of the line in DeKalb County, only 22.4% of the population is black. In Richmond County, blacks constitute 42%

of the county's population. Yet, blacks constitute 66% of the county's population within the district. Blacks constitute only 18.8% of the non-Eleventh portion of Richmond. In Chatham County, blacks constitute 38.1% of the population. Yet, in the portion of the county within the Eleventh, blacks constitute 84.1% of the population. On the other side of the line, they constitute only 15% of the population. Pl. Ex. 16, Table 3.

The same phenomenon of dividing citizens by race exists in the three other non-land bridge split counties as well.[7] Pl. Ex. 16, Table 5. In Twiggs County, 88.8% of the County's blacks are placed in the Eleventh. In Wilkes, the figure is 62%, and in Baldwin 89.5%. No one can seriously argue that such stark divisions are anything other than an intentional segregation of voters according to race.

In the face of this uncontroverted statistical evidence, the State Defendants in particular come forward with their own explanation for all the split counties, cities and precincts in the Eleventh District, somehow trying to show "non-racial considerations" in the dissection of these political subdivisions. While they criticize the Distrct Court for not commentng on every last squiggle, they surely

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[7] The two split counties which are exclusively land bridges are Henry and Effingham.

It was "necessary" to utilize a land bridge in Henry because it has a substantial population, which is 90% white. It can readily be seen that the Henry County corridor alone does not link the black population excised from DeKalb County to other population changes in the district by itself. The remainder of the linkage is provided by lining up three additional counties (Butts, Jasper and Putnam) in "single file" to reach the district's "geographic center." While these counties remained whole, they are very sparsely populated, collectively accounting for only 3.5% of the district's total population. Because they have no significant impact on the District's racial percentages, it was acceptable to leave them whole.

It is admitted by the State that an Effingham County land bridge exists solely to link black population in Savannah with the rest of the District. See State Admissions of Fact, Tr. IV, 159-60. Effingham County is 85% white.

realize that their efforts are an exercise in accentuating trivialities. Indeed, some of the most compelling evidence *contradicting* the State Defendants' current argument came from the Defendant Lt. Gov. Howard. When asked what portions of the boundaries of the Eleventh he considered to be a function of race, Howard responded "Well, basically *the whole district.*" Tr. IV, 208. (Emphasis added). According to him, the district lines were drawn "for the purpose of achieving a certain racial—a certain racial composition of the district. I think that's obvious. I don't think anybody disagrees with that." *Id.* When advised "Well, they [the Appellants] do", he responded: "We're trying to achieve a certain VAP in a certain population. Why else would you draw it like that?" *Id.*

Howard acknowledged that DeKalb County was an integral part of this effort. He noted that some black voters in DeKalb were "ceded" to the majority-minority Fifth District because of their history of low voter turnout. "They [the DOJ] wanted us to go in and get all the blacks that had the best voting records into this [Eleventh] district. . ." Tr. IV, 209-210. He further testified that the slice of Henry County that ended up in the Eleventh was a "bridge" designed to connect "the large block of black voters in DeKalb County and the large block of black voters elsewhere." Tr. IV, 211. Other locations for this land bridge, such as portions of Newton and Rockdale Counties, were considered as alternatives to Henry since they too "don't have any significant number of black voters." Tr. IV, 211. Regardless of the specific route chosen, the State Defendants admitted the sole purpose of the land bridge was to avoid white population in the search for black voters.

The Lt. Governor also acknowledged that the irregular lines in Twiggs County were the product of "computerized hunting for concentrations of blacks." Tr. IV, 213. One portion of the county was "becoming more white so we left that out." *Id.* As for Baldwin County, he recalled the understandable bitter opposition to splitting the county. "But the Justice Department told us that we had to go

in and get the blacks in Baldwin County . . . and include that in the Eleventh District. So we did that." Tr. IV, 312. Wilkes County followed the same pattern; the Lt. Governor explained its dissection as follows: "The areas that we have included in the Eleventh District in Wilkes County were more heavily black than the northern part of it. So we went in and just got as many black voters as we could on the southern edge, so that's why the line sort of meanders around through there." Tr. IV, 212. The land bridge in Effingham County "was done to minimize the effects on Effingham County, but at the same time build a bridge to Savannah to get the black voters in Savannah as we were directed to do" Tr. IV, 214.[8]

Aside from this and other compelling testimony, the State Defendants' effort is premised on a logical flaw. Simply because a district line follows a portion of a precinct line or a municipal boundary line or partially coincides with a major thoroughfare does not begin to suggest that its placement was not race-based. Racial percentages of precincts are well known when they are included in a district. Tr. II, 271-82. It was the ACLU's

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[8] While the Lt. Governor did not testify extensively about the district lines in Savannah and Augusta, other witnesses did. Augusta was slashed to pieces solely to achieve desired racial percentages. Tr. I, 93. It was a "block by block" racial search. P.I. Tr. 51. So many voting precincts were split that some 32 new ones had to be created. Tr. II, 224. The land bridge to reach Augusta is a strip of nearly deserted territory. The State took its cue from the ACLU's Max Black plan. The reason for the difference between it and the final plan was explained by Ms. Meggers: "[I]t [the Max Black Plan] only drew the three [black majority] districts. I had to draw all eleven of them." Tr. I, 102.

As for Savannah, Mr. Dixon, who drew the lines, made clear that his motives were purely race-based. "Frankly, taking the directive from the Justice Department, [I was] quite literally identifying the concentrations of the black urban concentrations in the City of Savannah and somehow getting to them and incorporating them in contigiuty [with] the Eleventh District. P.I. Tr., 52. He drew the lines "to make sure that blacks were on one side and the whites were on the other." *Id.* When asked if there was any consideration besides race in this effort, he testified there were "none whatsoever." Tr. IV, 159-60.

Kathleen Wilde, the primary architect of the "Max Black" plan, who characterized precincts as the "traditional building blocks" of districting. Tr. IV, 83. The legislative guidelines say the same thing. J.A. 68-69, 75. It is likewise an unassailable fact that, in some urban areas, black population tends to be concentrated on one side of a major thoroughfare or rail line. Tr. IV, 80. This is the case both in parts of DeKalb County and in parts of the City of Savannah. Tr. II, 216. And the computer software provided racial data in census blocks that often coincided with these types of "lines." This was the lowest level at which the computer could access racial information, which aside from VAP and total population, was the only demographic information maintained in the system. Tr. I, 50-51; Tr. II, 14.

In light of the way this district's lines corral black voters and exclude whites, as borne out by the statistics concerning the racial impact of those lines on Georgia's congressional districts, further discussion of the massive *direct* evidence of racial gerrymandering would appear almost superfluous. As the District Court stated: "At a glance, the appendages of the Eleventh are obviously designed to do something; after cursory exploration, it rapidly becomes clear that the 'something' is maximization of black voting strength." J.S. App. 49. Suffice it to say that, without exception, every witness who testified in the case concerning the redistricting process confirmed that the 1992 congressional redistricting plan was a deliberate effort to separate voters according to their race. *See* Murphy, Tr. II, 62; Meggers, Tr. I, 101-02-106-07; 125-25, 270-273; Dixon, P.I. Tr. 41-42, 46-49, 51-52; Hanner, Tr. III, 247-259; Garner, Tr. III, 210-214. While Appellants do their level best to downplay the evidence presented at trial, they cannot honestly disagree with the Court's conclusion that "copious amounts of direct evidence" was presented to establish that the dramatically irregular lines of the Eleventh Congressional District were the product of race-based manipulation. J.S. App. 52.

Georgia's 1992 Redistricting Plan Makes A Mockery Of Traditional Districting Principles

Shaw makes clear that traditional districting principles, such as compactness, contiguity and respect for political subdivisions are not constitutionally required. Nevertheless, they take on considerable significance in the context of ascertaining whether racial gerrymandering has occurred. This is because they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra* at 2827.

Appellants attempt to sidestep this aspect of *Shaw* by suggesting that a core traditional districting principle like compactness has "relative unimportance" in Georgia. State Brief, at 20; DOJ Brief, at 24-25. Such a contention is simply untrue. While it is correct that the guidelines of the House and Senate Reapportionment Committees do not expressly use the word "compactness", both sets of guidelines plainly state that, where legal requirements are satisfied, "efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts." J.A. 68, 75. Contrary to Appellants' suggestion, Georgia has a long history of reasonably compact districts, with common economic interests being the "prime driving force behind congressional redistricting traditionally." Tr. I, 21-22. Linda Meggers, among others, recounted the specialized interests traditionally lying at the heart of the First (coastal) District, the Second (specialized agricultural) District, the Third (military) District, and the Seventh (textile and carpeting) District. Tr. I, 23-27. The Eighth District, notwithstanding its relatively large size, was "definitely agricultural from one end to the other." Tr. I, 14. It was undisputed that its northward expansion was only undertaken to comply with one-person one-vote. Tr. I, 31-34. The Ninth District is the State's mountain district where poultry is the predominant industry.[9] Tr. I, 23-27. The

[9] The Abrams Intervenors argue that the Ninth District was drawn to be a distinctive white community. This is incorrect. The

Tenth has traditionally encompassed the Athens-Augusta area and the surrounding rural areas of East Central Georgia. Tr. I, 25. *See* also P.I. Tr. 59-63; Tr. III, 251.

Georgia's prior congressional maps confirm the significance of compactness in congressional redistricting. A review of the maps from 1964, 1971, and 1982 invariably reflect reasonably compact districts. J.A. 78-81. By way of contrast, they also amply demonstrate the unprecedented departure the 1992 redistricting plan made from those practices.

That the State Defendants would now challenge the significance of compactness in Georgia congressional redistricting is a remarkable turn of events. During the preclearance process, Georgia's Attorney General was literally pleading with the DOJ not to require what ultimately was required. In his letter of March 3, 1992, he wrote: "In addition, the extension of the Second District into Bibb County and the corresponding extension of the Eleventh District into Chatham County, with all of the necessary attendant changes, *violate all reasonable standards of compactness and contiguity*." J.A. 118. (Emphasis added.) How could something which was so critical then become marginal now?

As the District Court found, the Eleventh District is not compact by any credible definition of the term.[10] J.S.

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mountain region of the State is not race-based. The region is geographically distinct. (In contrast, the Eleventh traverses four regions of the State. Pl. Ex. 43.). There are no adjacent black population concentrations that were excluded. No evidence was offered at trial to suggest that racial gerrymandering had anything to do with the configuration of the Ninth District. In a state 73% white, there will be predominantly white districts, particularly when 61.7% of its black citizens are packed into three majority-minority districts.

[10] Even the Attorney General testified that the Eleventh District is not compact. P.I. Tr. 148. The only witness at trial to offer a contrary opinion was an expert retained by the State Defendants. She offered a "meanderingness" test developed by the State Defendants' attorneys especially for this litgation. None of the

App. 80. The massive amount of evidence presented at trial on this subject confirms what any reasonable individual would conclude given even a nodding acquaintance with the geography of the State and its redistricting history.[11] The sole reason for this lack of compactness is that "reasonable standards of compactness and contiguity" were of no interest to the DOJ. All that mattered was the lumping together of distantly located urban and suburban blacks by means of a sprawling, and often tortuous, rural pathway.[12]

Appellants refer to it in the briefs, and for good reason. The District Court found it "especially useless in analyzing the Eleventh District" since its measures only "the vast—and sparsely populated" core of the District while the "narrow—and densely populated—appendages escape notice." J.S. App. 79. Far from aiding Appellants, the test is "an excellent means of highlighting the egregiously manipulated portions of any voting district." *Id.*

Not surprisingly, using mathematical measurements of compactness the Eleventh District scores the lowest in Georgia, and among the lowest nationwide (bottom 8% in "dispersion score"; bottom 11% in "perimeter score"). Pl. Ex. 85, 7.

[11] The State Defendants offered into evidence maps of certain Georgia cities for the ostensible purpose of showing that "geometric niceness" is relatively unimportant in drawing municipal boundaries. These maps are irrelevant to whether compactness is a traditional districting principle in congressional redistricting. At the Pretrial Conference, the District Court advised the parties that municipal boundaries are accretions of annexations which are tax-driven and that the Court had little interest in them. At trial, the Court again advised the State these maps were without evidentiary value. Tr. V, 120-21, 123. And the State offered no evidence as to how they were relevant.

[12] At pp. 23-24 of its Brief, the DOJ states the Eleventh District "generally occupies an area similar in shape to, but generally south of, the former Tenth District, which also spans a central part of the State from Augusta to the Atlanta suburbs." What the DOJ bases this statement on is unknown. It is clearly wrong. A cursory review of prior redistricting maps shows that the "old Tenth" does not resemble the Eleventh District in any way, shape or form. The old Tenth had no hooks, tails or other wild protrusions nor did it ever extend, in the words of Ms. Meggers, "literally from the shadow of the Capital to Tybee [Lighthouse in Savannah]." Indeed,

Appellants had to acknowledge that "respect for political subdivisions" is an important and traditional redistricting principle in Georgia. They are thus forced to contend that political subdivisions *were* respected in 1992. In fact, nothing could be further from the truth.

The essence of the State Defendants' argument is that "86.6% of the entire area of the Eleventh Congressional District is comprised of whole counties" and that "71.1% of the Eleventh Congressional District lines runs right along boundaries of the State, counties or municipalities." [13] These numbers, however, do not mean political subdivisions have been respected. All that these numbers demonstrate is that county boundaries have been followed only where relatively few people are located and where there is no material impact on the racial composition of the district. Once again, the statistics tell the story in dramatic fashion.

As shown in Plaintiffs' Table 2 (Pl. Ex. 24), the portions of DeKalb, Richmond and Chatham Counties located in the Eleventh District *represent less than 3.5% of the land area included in the district.* Yet, almost two-thirds of the population of the district and almost three-quarters of the black population of the district resides in these three relatively small areas, all at the extreme ends of appendages. J.A. 131.

When the analysis is extended to include all eight split counties, it can be seen that *political subdivisions have been "respected" where less than 27% of the district's citizens reside. Id.* Where the vast majority of people live, political subdivisions have not been respected at all.

The degree to which political subdivisions have *not* been respected in the 1992 congressional redistricting plan

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it never extended further southeast than Richmond County and the City of Augusta.

[13] The State Defendants' utilization of State boundaries to "up" its percentages is curious indeed. The State has little choice but to draw congressional districts within them.

is without precedent in Georgia history. Between 1931 and 1964, Georgia's congressional districts had no split counties. J.A. 81. In 1964, only Fulton County was split—in order to comply with one person one vote. J.A. 78. In 1971, two counties were split, Fulton and Whitfield.[14] J.A. 79. In 1982, only three (of 159) counties were split—the metro Atlanta counties of Fulton, DeKalb and Gwinnett. J.A. 80.

The 1992 congressional redistricting plan splits 26 counties. Pl. Ex. 16A. This represents a 1200% increase over the 1971 plan and a 767% increase over the 1982 plan. In the Eleventh District alone, *almost three times* as many counties are split than were split in the *entire* 1982 congressional redistricting plan. Of the 26 split counties in the current congressional redistricting plan, 20 of them occur in the Eleventh and Second Districts. These numbers are stunning in light of the heavy emphasis citizens placed on *not* splitting counties at public hearings on redistricting held throughout the State in 1991. Tr. III, 207, 246; P.I. Tr. 43.

The 1992 congressional redistricting plan is no less sparing of municipalities. J.A. 128. Prior to 1964, there were no split municipalities. In 1971 there were two, Atlanta and Dalton (Whitfield County). In 1982, five metro Atlanta cities were split. However, the 1992 plan splits 31 municipalities, an increase of 520% over the previous decade.

The evidence at trial was uncontradicted that the ACLU's "Max Black" plan served as the minority population benchmark throughout. Including whole, albeit sparsely populated, counties did not alter the racial composition of the district in any significant way because Ms. Meggers intensified the racial gerrymander where it counted—in the densely populated, but distantly located, black urban centers. As she testified: "I was trying to

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[14] The splitting of Whitfield County was due to political considerations. The legislature took a "big beating" for having done so. Tr. I, 35. The split was removed in the next round of redistricting.

clean the plan up, get back the whole counties as much as I could, and at the same time achieve this benchmark number that had been presented to us in the Max Black plan." Tr. I, 96-97. The lines Ms. Meggers drew in urban areas became even more irregular than the ACLU lines and necessitated splitting more precincts. Tr. I, 98-99; Tr. IV, 84. "[W]hat I did was basically go in and find white areas to take out to offset the whites I may have added in the rural counties." Tr. II, 30; Tr. I, 102, 224. By creating more jagged and irregular lines in population centers, including splitting precincts, Ms. Meggers got the plan "within just fractions of a percentage of what they achieved" in the Max Black congressional plan. Tr. II, 55.

As the foregoing makes clear, the State Defendants' assertions regarding "respect for political subdivisions" is a charade. Essentially they argue that, as long as it can locate a "desert" in which to adhere to county lines, it then gained free rein to engage in racial gerrymandering the population centers that are the lifeblood of any voting district.[15]

Georgia's 1992 redistricting plan maintains but token contiguity throughout its various districts. Dr. O'Rourke characterizes the Eleventh District as merely a "conglomeration of dissimilar places." Tr. III, 134. Some of these places, he observed, were connected by "narrow threads." In his Supplemental Report (Pl. Ex. 85, at 8), he references several areas where the Eleventh "barely satisfies the test of contiguity." In the Richmond County "hook", the district narrows to the width of the local airport. In

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[15] A similar disrespect for political subdivisions is evident in the Second District. There, twelve counties are split. In each, the district includes a highly disproportionate share of the county's black residents. In Bibb County, the Second lassos in 82.4% of the county's black citizens. In Dougherty County, the figures rises to 85%. In Muscogee County, the figure rises still further, to 86.9%. As shown at J.A. 135-136, the inclusion of black voters in the Second District, via gerrymandered lines, had a determinative impact upon the district racially.

Effingham County, the Eleventh District contracts to a strand less than ½ mile wide. In Savannah, the district sends a tentacle through a breach in East Victory Drive that is even narrower. In Henry County, the western edge of the district is but several hundred yards from the eastern border. In Chatham County, one connecting point consists of swamp land. Tr. III, 115. At another point, the district is nothing more than the water column of the Savannah River itself. Tr. IV, 161. In a state as large as Georgia, and in a district which is 260 miles long, this is a remarkable spectacle.

A district which violates, in Georgia's Attorney General's own words, "all reasonable standards of compactness and contiguity," provides strong objective evidence that something dramatic is impacting the district lines. The District Court found it is "practcally stipulated" (J.S. App. 43) that but for race, none of this would have been considered, let alone implemented. No prior congressional redistricting map in Georgia's history contains districts even remotely resembling the Eleventh.[16]

The DOJ sums up its discussion of traditional districting principles with the bald assertion that the Eleventh District "comports reasonably with Georgia's ordinary districting practices." DOJ Brief, p. 23. This is not a

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[16] While "communities of interest" were not specifically referenced in *Shaw*, a significant amount of time was devoted to this subject at trial. The DOJ, along with the Abrams Intervenors, argued that blacks constitute a distinct community of interest coextensive with their skin color. The Court rejected this for a variety of reasons, among them that poor blacks in Savannah do not feel some automatic bond to those living in black neighborhoods in Metro Atlanta, many of which are quite affluent. J.S. App. 45-46. Dr. O'Rourke provided "compelling testimony . . . making it exceedingly clear that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." J.S. App. 81; Pl. Ex. 85, at 10-29. Black medium income in DeKalb County, for example, is nearly 50% higher than black medium income in the next ranking county (Richmond) and more than twice as high as black medium income in the lowest ranking eight counties.

serious argument. Surely if the DOJ was aware of a prior Georgia congressional district dominated by tails, hooks, protrusions, with utterly indecipherable designs at the end of these appendages, it would have brought it to the District Court's attention. It most assuredly did not.[17]

The DOJ And The Demand For Maximization

Long before the DOJ provided formal notice that it would not accept anything less than the maximum number of majority-minority districts that could be constructed in the State, the DOJ had communicated this requirement to members of Georgia's Black Legislative Caucus, which was represented by the ACLU. As early as August, 1991, State Rep. Tyrone Brooks of Atlanta announced to the General Assembly:

> "We are simply trying to maximize our voting strength, and I think we are right in line with the mandate for the U.S. Department of Justice.
>
> The Justice Department is not going to say, well, the lines look funny, or you got a portion of Chatham, you got a portion of DeKalb, more citizens of DeKalb are in this plan than Chatham. They are not going to be concerned about trivial issues like that. They are going to be concerned about whether or not you're diluting the voting strength of minorities or whether or not you are maximizing the voting strength of minorities. That's the only thing that I get from Washington when I talk to the lawyers. They want to make sure that, wherever possible—that you are drawing majority-

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[17] The DOJ's assertion that districts the State "continues to draw" (i.e., in 1992) should serve as an "appropriate benchmark" for determining whether a district is highly irregular or bizarre is almost Kafkaesque. It was the DOJ's pummelling which drove the State to draw the Second, Third, Fifth, and Eighth and Eleventh Districts as it did. As Bob Hanner, Chairman of the House Reapportionment Committee, testified, the only thing DOJ officials were interested in was racial percentages. Tr. III, 256. Ultimately, the Georgia legislature "split virtually everything except homes to . . . maximize black percentages." Tr. III, 250.

> minority districts. *And that's all I hear. I don't hear them saying the lines look funny, the map looks crazy or it's a zig-zag or it's something someone just threw on the wall. I hear them saying, make sure you don't dilute, and make sure, wherever possible, you create majority black districts, and I don't hear anything different.*"

Pl. Ex. 130, 16-18. (Emphasis added.)

While the DOJ studiously avoided the term "maximization" and the "wherever possible" standard in its written communications with the State, there is no question that the effect of its written communications was to require precisely what it told Representative Brooks was necessary to pass DOJ muster.

The technique used by the DOJ to coerce the State into maximizing the number of minority-majority districts was to exploit the "purpose" prong of Section 5 of the VRA. The initial plan offered by the State of Georgia was obviously not retrogressive since it doubled the number of majority-minority districts, from one to two.[18] In this litigation, the DOJ freely admitted that neither Georgia's first or second submissions were retrogressive.

In utilizing the "purpose" prong of Section 5 to impose its maximalist will on the State, the DOJ resorted to the concept of "pretext." J.S. App. 25-26.[19] Any plan

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[18] At a June, 1990 training conference of the State Legislature Reapportionment Task Force held in Baltimore, Maryland, then-Assistant Attorney General for the DOJ's Civil Rights Division, John Dunne, advised the attendees that the DOJ was going to take a particularly exacting approach to redistricting in Georgia. P.I. Tr. 17. Georgia's legislative leadership was determined to approach redistricting so as to "meet the mandates of the Justice Department. . . [T]hat was a positive thing the committee wanted to do." Tr. III, 252.

[19] Notwithstanding its admitted use of "confidential informants" to spy on State legislators and officials throughout the redistricting process, the DOJ presented absolutely no evidence at trial suggesting any effort to discriminate against minorities in the two congressional redistricting plans that were rejected by the DOJ. Indeed the only evidence was to the contrary. Tr. III, 221, 258.

which did not lump as many blacks together as another plan was deemed suspect. Of course, the DOJ had before it the ACLU's Max Black plan. It was obvious throughout the redistricting process that this was the standard by which all other plans would be judged. J.S. App. 20; Tr. I, 65.

Initially, the DOJ did not formally require that the State extend the Eleventh District to Savannah. Its initial rejection letter, dated January 21, 1992, raised a concern "that the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts", and made specific comments concerning the need to better recognize "the black voting potential" in the southwest (Second) district and in Baldwin County in the Eleventh. J.A. 105-106.

The DOJ's rejection letter did not specify what it meant concerning black voters in the Second District. However, as the District Court noted, to maximize the number of black districts in the State, it would be necessary to somehow place black population concentrations in Macon into the Second District, and extend the Eleventh to Savannah. This was the "linchpin" of Ms. Wilde's Max-Black plan. She had alerted the DOJ that it was the "key to drawing a third black district." Pl. Ex. 57. *See* J.S. App. 19-20.

Based on the information before him, Senate Majority Leader Wayne Garner became convinced that, despite the lack of specificity in the DOJ's rejection letter, no plan was going to gain DOJ approval unless the Eleventh was extended into Chatham County and the black residents of Savannah were gerrymandered into the district. He testified: "[L]ooking at this entire process and listening to the other members of the committee, I was of the opinion and told the Lt. Governor early on, I said if we're going to get a plan past the Justice Department and get us out of here and on to these elections, that district is going to have to go to Savannah. In talking with Ms. Meggers, my point was the district must have the highest

percentage of black population that we could get, [regardless] of where we have to go." Tr. III, 210. Solely to "get the percentages high enough" for the DOJ (Tr. III, 210), the Georgia Senate passed a plan in late February, 1992 containing an extension to Savannah in the Eleventh, and including black concentrations in Macon in the Second District by means of a tentacle extending into Bibb County.[20]

Senator Garner informed Georgia House Reapportionment Committee Chairman Mr. Hanner that in his view, the DOJ "was going to mandate" a district extending from DeKalb to Savannah. Tr. III, 254. However, the House would not go along "unless the Justice Department mandated us to do it in writing." Tr. III, 250. As Representative Hanner testified: "I thought it was ridiculous. I thought—I just didn't think we'd have to—I thought that was the max, and I did not think we would ever have to do that." Tr. III, 250; Tr. II, 69.

By letter of March 20, 1992, the DOJ made it explicit where it stood. Georgia's plea that the "extension of the Second District into Bibb County and the corresponding extension of the Eleventh into Chatham County, with all of the necessary attendant changes, violates all reasonable standards of compactness and contiguity" fell on deaf ears. In the Eleventh District, the extension to Savannah would be required. The DOJ rationalized this requirement by citing the February 1992 Senate Plan referenced above—the Plan that was passed solely because the Senate leadership believed it was ultimately going to be mandated by the DOJ. J.A. 124. As for the Second District, the DOJ now made it clear that it was going to require the inclusion of "black population concentrations in areas such as Meriwether, Houston, and Bibb [City of Macon] Counties." J.S. App. 124-125. The fact

[20] The Senate Plan generated three majority-minority districts in terms of population, but not in terms if VAP. In terms of VAP, the Senate Plan was 58.66% black in the Eleventh District, but "only" 47% black in the Second. J.A. 63.

that the State had previously been forced to split counties elsewhere to satisfy the DOJ served as the "evidence" that the failure to split additional counties elsewhere at the DOJ's command was "pretextual."[21] J.S. App. 125. Since the Macon/Savannah trade had been "suggested to the legislature during the redistricting process", it simply had to be done. J.S. App. 125. Issues of compactness, contiguity, respect for political subdivisions and former district cores, local economic interests and the like were entitled to no consideration whatsoever.

All of the foregoing machinations aimed at minority vote maximization transpired prior to this Court's opinion in *Shaw v. Reno*. Faced with litigation on one, if not two fronts,[22] a legislative session which was over by April 1,

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[21] Although the DOJ cites earlier versions of metro Atlanta's Sixth District in its brief (DOJ Brief at 32-33), its rejection letters make no reference to it. Its configuration is unremarkable. The district had to split counties due to one-person one-vote and the need to maintain the majority-minority Fifth District.

[22] Absent DOJ preclearance, a State must obtain a declaratory judgment under Section 5 from the District Court for the District of Columbia before a redistricting law can take effect. If the failure to obtain preclearance results in a malapportionment, the State is subject to suit. In Georgia, such a suit was filed on February 12, 1992 in the U.S. District Court in Atlanta. The case, *Jones v. Miller*, C.A. No. 1:92-CV-330-JOF, was filed by Republican interests seeking to have the Court draw the State's Congressional district lines. The complaint also alleged a violation of Section 2 of the VRA and sought to have the Court draw "the maximum number of majority black districts" which could be drawn. Pl. Ex. 80, p. 4. The Court in *Jones* had indicated that, if a plan was not precleared by the close of the legislative session, it would "commence drawing a plan" on April 3, 1992. P.I. Tr. 148; Tr. V, 23.

The State Defendants moved to dismiss the Complaint in *Jones v. Miller* on February 20, 1992. It labelled the maximization effort "legally unsupportable" (Pl. Ex. 81, at 5) and asserted that "[t]his amounts to nothing more than a complaint that the State should have, but has not, sought proportional representation for minority citizens as a goal." *Id.* at 17. The State Defendants lambasted the claim as "not only unprecedented, but dangerous to the political process in this nation." *Id.* at 18. They noted how the resulting

candidate qualifying which was set to begin on April 27, a primary election in July and a general election in November, the State simply folded. Without formal committee review in either the House or Senate, the Georgia General Assembly hastily passed a third plan precisely as the DOJ had laid it out in its March 20 letter. This third plan was hand-carried to Washington on April 1, 1992. A letter granting preclearance was issued the following day.

In strictly numeric terms, Georgia's 1992 congressional redistricting plan was the proverbial political feast for blacks. Even though Georgia's black VAP was 24.59% for the State's total VAP, majority-minority districts constituted 27.27% of the State's eleven districts. In the Eleventh District, the lumping together of distantly located blacks and the extensive surgery to avoid whites resulted in a saturated district containing a black population of 64.07% and a black VAP of 60.36%.[23]

SUMMARY OF ARGUMENT

Incantations of historical discrimination cannot automatically conjure up remedial action. Governments must quantify the present day effects, if any, and insure there is a tight fit between the continuing consequences of the past discrimination and the remedy being implemented.

"racial polarization would encourage candidates of one race to be unresponsive to the needs or wishes of another race", thereby breeding "extremism in both races to the detriment of all citizens." *Id.* at 19. A Max Black plan in the State Defendants' words, "will most certainly have the effect and result of diminishing minority effectiveness in the political process." *Id.* at 4. There are astonishing words in light of the positions taken by the State Defendants in this case.

[23] The impact of racially gerrymandering congressional district lines for the purpose of creating majority-minority districts has a dramatic impact on the VAP in the remaining districts. These districts are now all overwhelmingly white in composition. Black VAP in these districts ranges from 3.47% to 20.32%, with the average being 12.9%. The racial polarization about which the State Defendants spoke so eloquently in *Jones v. Miller*, *supra*, has come to fruition.

In Georgia, the "remedy" was maximization, both of the number of majority black districts and the minority populations included within them. There is no connection between the "Max-Black" benchmark used by the DOJ and the narrow tailoring required whenever race conscious remedies are invoked, unless narrow tailoring is defined as proportional representation of the races. To argue otherwise is to fall victim to an entitlement mentality that demands indefinite dividends from a national debt that was truly due to past generations.

Appellees strongly disagree with the thesis of the State Defendants' appeal which argues that the existence of *any* non-racial factor which influenced, however slightly, any twist or turn of the district's boundary provides an exemption from the teachings of *Shaw v. Reno*. Unless a district is 100% black, there will always be some bit or piece of boundary not drawn *solely* to segregate the races. For example, it might be a land bridge moving the district from one concentration of minority voters to other distant populations. The racial purpose is still the same. Racial gerrymandering occurs when the State draws a district that artificially manipulates non-compact dispersed minority populations into a majority black district without regard for the State's traditional districting principles. The test of such a district's legality begins with the Voting Rights Act, but ends with the Equal Protection Clause of the Fourteenth Amendment.

Under the Fourteenth Amendment, racial classifications are "presumptively invalid and can be upheld only upon extraordinary justification." *Brown v. Board of Education*, 347 U.S. 483 (1954). The racial gerrymander of voting districts must be subject to the same constitutional scrutiny as any other legislative use of race. *Shaw* clearly so held. We should not turn away from the principles that give primacy to our constitution because the siren song of racially proportional representation deafens us to the subtle, but ultimately racial plea Intervenors make to exempt majority-minority districts from constitutional accountability.

Shaw v. Reno catalogs just why Appellants' vision of America's political landscape is inconsistent with our constitutional limitations on the use of racial classifications as a basis for legislation. Congress has defined the extent to which the federal government will involve itself at the State ballot box with the passage of the Voting Rights Act. Congress never dreamed this Act would mutate into a justification for racial gerrymandering to further the DOJ's mandate of proportional racial representation via a *de facto* affirmative action program purportedly designed to redress "past discrimination".

The Abrams Intervenors would eviscerate *Shaw* by denying Plaintiffs' standing. Do Appellants truly believe America is better off politically segregated because the end result may be more Black office holders? They seek to legitimize the gerrymander as "benign" discrimination when the tools used to fashion the racial gerrymander are straight out of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and *Plessy v. Ferguson*, 163 U.S. 537 (1896). The old rallying cry of 'separate but equal' has been reincarnated in the 'separate but maximized' demands of the Intervenors. Justice Douglas phrased it best, calling it the "separate but better off theory." *Wright v. Rockefeller*, 376 U.S. 52, 61-62 (1964).

Because of the extensive fact finding critical to any analysis of this type of claim, the District Court's judgment as to the existence of a bizarre district that is the product of racial gerrymandering must be affirmed unless clearly erroneous. And since the State has declined to defend this district once strict scrutiny is applied, the outcome of this case should be clear.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE RACIAL GERRYMANDERING

Leary of mounting a frontal assault to reverse *Shaw* so soon after its announcement, the Abrams Intervenors' chosen strategy is to limit its reach. To deny Plaintiffs' standing would completely eviscerate *Shaw* and redirect us from the path *Shaw* has blazed towards the color-

blind society all parties acknowledge to be the ultimate goal.

Only the Abrams Intervenors have raised the issue of standing before this Court.[24] Their argument is a simple one—Appellees have purportedly suffered no "individual harm" and therefore lack the requisite standing to challenge a majority black voting district constructed by means of a racial gerrymander.

The Abrams Intervenors' "individual harm" argument is really no more than a restatement of the dissenting view in *Shaw* that the plaintiffs suffered no "cognizable injury." *Shaw* resolved that issue by untethering the individual harm suffered "[w]hen voting districts are carefully planned like racial wards" (*Hays v. Louisiana*, Case No. 92-1522, Slip Opinion, at 10 (on remand)) from the concept of group harm inherent in the vote dilution setting relied upon by the dissenting Justices. Notwithstanding *stare decisis*, the Abrams Intervenors effectively ask this Court to overrule *Shaw* after the ink has barely dried.[25]

The theory is a dangerous one because of its consequences if it were ever accepted. Practically speaking, no

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[24] In light of *Shaw v. Reno*, the District Court denied their Motion to Dismiss for lack of standing in its entirety. Abrams J.S. App. 104-111. As to the voters, the three judge Court unanimously stated that the Motion "borders on frivolous." Abrams J.S. App. 110. No post-*Shaw* district court has denied voters standing to challenge the constitutionality of a congressional redistricting scheme. See *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994).

[25] The District Court's opinion acknowledges that, if Plaintiffs' claim were considered solely in the context of vote dilution or interference with their ability to cast a ballot, these Plaintiffs have suffered no individual harm. J.S. App. 33. The Court correctly observed, that *Shaw* was not addressing these harms, but the harm which occurs when the state "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency has a whole." J.S. App. at 32, citing *Shaw*, 113 S.Ct. at 2828.

voter could ever challenge a racially gerrymandered majority minority district. This approach would sterilize *Shaw v. Reno* and wrongly insulate patently unconstitutional racial classifications in the context of voting districts from judicial review.

The argument also misperceives the nature of Plaintiffs' claim. *Shaw v. Reno* clearly recognizes a voters' entitlement to challenge the use of racial classifications in the creation of voting districts. As the District Court unanimously recognized, "the cases stress that unlawful racial gerrymandering and its resulting balkanization is harmful to citizens of *all* races. The injury flowing to an individual so classified for voting purposes is manifest from *Shaw*." Abrams J.S. App. at 11. This is not a vote dilution case brought by white voters. Plaintiffs bring the "analytically distinct claim" recognized in *Shaw* that the redistricting plan under review cannot rationally be understood as anything other than an effort to segregate voters into separate voting districts on the basis of their race without sufficient justification. *Shaw*, 113 S.Ct. at 2830.

Stripped to the bare wood, the Abrams' argument on standing is but a contention that overall proportionality —i.e., matching the percentages of majority white and majority black districts with the racial demographics of the entire state's population—*negates* any basis for constitutional scrutiny. They would forgive all intentional, race-based line drawing which creates majority black districts no matter how egregious the gerrymandering.[26]

This modern day version of "separate but equal" cannot be squared with the precedents of this Court premised

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[26] The standing defense parallels the increasingly time worn, if not now obsolete, contention that deployment of racial classifications perceived as beneficial to the minority are considered "benign" racial discrimination exempt from strict scrutiny. The Court has rejected this contention time and time again. *See e.g., Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Board of Education*, 476 U.S. 276 (1986). Every post-*Shaw* District Court decision has rejected the argument.

on the nondiscrimination paradigm which "embodies the idea that race-dependent decisions are unacceptable except in the most unusual and compelling circumstances." Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 U.Va.L.Rev. 633, 638 (1983). This principle has been a central feature of this Court's equal protection jurisprudence combatting government-sponsored separation of the races since *Brown v. Board of Education*, 347 U.S. 483 (1954).[27] In *Shaw*, the Court made clear the non-discrimination principle applied equally to voting districts.

In *Loving v. Virginia*, 388 U.S. 1 (1967), this Court found Virginia's anti-miscegenation statute barring interracial marriage unconstitutional. The Court rejected the State's argument that, since the law applied to white and black citizens alike, there was no violation of equal protection. The constitutional issue did not turn on proof of the law's effect (or lack thereof) on any particular racial group but on the government's sponsorship of racial classifications. The Court's decisions rejecting race-based jury selection, regardless of what race is being excluded, make the same point. *Hernandez v. New York*, 500 U.S. 352 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Plaintiffs challenging intentionally-crafted, drastically irregular black majority voting districts possess the same credentials to complain as the *Loving* plaintiffs. While there is no constitutional right to vote in any particular election or to be a member of any particular district, voters do have grounds to complain if the district in which they vote cannot rationally be understood as anything other than an effort to segregate voters into separate voting districts on the basis of their race without sufficient

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[27] *See* e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) (swimming pools); *Evans v. Abney*, 396 U.S. 435 (1970) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (transportation); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses).

justification. Under the Abrams' view of standing, the State could assign its citizens into racially segregated districts, loosened from all relevant geographical moorings, in order to achieve proportionality. Simply put, the argument makes no sense. If a citizen and registered voter in a gerrymandering congressional district cannot complain of the constitutional violation enunciated in *Shaw*, who can?[28]

The Abrams Intervenors finally argue that white citizens should not be able to complain about being included in a majority black district. That is but an exercise in rhetoric. It is the artificiality of the district stemming from the intentional manipulation of its racial makeup that raises the constitutional ante to the level of strict scrutiny. While the Intervenors scoff at the stigmatic harm a voter suffers by being included in what the public sees as a racially rigged district, Plaintiff Henry Zittrouer gave poignant testimony about what it was like to be irrelevant to the congressional politcal process, to know you and your family now live in a spindly land bridge made up, in large part, of uninhabited swamp land that is politically divorced from your home county. He is separated from his relatives by only a dirt road; but that defines the dividing line between congressional districts. Tr. V, 26-29. Henry Zittrouer became a brick on the highway of electoral busing. Constitutionally, he deserves the right to have his case heard.

II. THE DISTRICT COURT'S DETERMINATION THAT THE ELEVENTH DISTRICT IS THE PRODUCT OF RACIAL GERRYMANDERING IS NOT CLEARLY ERRONEOUS

The State Defendants no longer pretend the Eleventh District can survive strict scrutiny.[29] Instead, the State

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[28] Four of the Plaintiffs in this action are voters in the Eleventh District. The fifth, Plaintiff DeLoach, lost the 1992 democratic congressional runoff election to the current representative in the Eleventh, and desires to run again without the outcome being predetermined on the basis of race.

[29] In their Brief, the State Defendants never discuss strict scrutiny. They only assert that the district would pass muster under

hinges its appeal on one argument—that "bizarreness" is an essential element of Plaintiffs' claim and that this district is "not bizarre." Appellees disagree with the State Defendants' legal contention that "bizarreness" *per se* is an essential element in establishing an unconstitutional racial gerrymander. *See* J.S. App. at 30, 41-42; *Shaw v. Hunt,* 861 F.Supp. at 430-31; *Hays v. Louisiana,* 839 F.Supp. at 1194-95, 1202 n.46. However, regardless of how this legal issue is resolved, the State's case nevertheless depends on a factual issue—whether the Eleventh District satisfies a "bizarreness" threshold. Given the fact-intensive nature of the State's disagreement with the District Court's decision, it is important to first establish the appropriate standard of review.

This Court has made clear that the District Court's findings of fact are reviewed under the "clearly erroneous" standard. This rule has been specifically held to include ultimate findings of fact in Voting Rights Act cases. As stated in *Thornburg v. Gingles,* 478 U.S. 30, 78 (1986):

> "[O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a). *See, e.g., Rogers v. Lodge,* 458 U.S. at 622-627; *City of Rome v. United States,* 446 U.S. 156, 183 (1980); *White v. Register,* 412 U.S., at 765, 770."

In *White v. Register,* 412 U.S. at 769-770, this Court employed a similar analysis, stating:

> "[W]e are not inclined to overturn these findings, representing as they do abundant history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

"more intensive scrutiny" (State Brief, at 45), but provide almost no substantive analysis. At no point do the State Defendants propose a "compelilng governmental interest" to this Court, nor do they address the issue of "narrow tailoring." Apparently, the State Defendants urge an intermediate standard of review, rather than strict scrutiny, perhaps taking their cue from Justice Souter's dissent in *Shaw.*

Elsewhere in the *Gingles* opinion (478 U.S. at 79), the Court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

The same reasoning applies to whether a district's lines are highly irregular and whether racial gerrymandering has occurred. The rationale for the deference to the fact-finder is equally applicable in both types of cases. In each case, local district courts possess the knowledge and experience with the local jurisdiction at issue to make the factual determinations on which these cases must turn. *See Wright v. Rockefeller.*[30]

The District Court here brought its considerable local knowledge to bear in this case, as evidenced by its exhaustive opinion. That knowledge is an indispensable ingredient to any sound judgment as to whether this district is characterized by such irregularity and so departed from Georgia's traditional districting principles for racial reasons that it constituted a suspect racial gerrymander which must stand the test of strict scrutiny.

Although the dissenting opinion focused exclusively on the factual issue of "bizarreness."[31] it did not contend

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[30] The standard of review under the clearly erroneous standard is well settled. A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

[31] The dissenting judge considered "bizarreness" as an element of the Plaintiffs' claim, barring any inquiry into legislative intent until the district was determined to be bizarre. The majority opinion positions "bizarreness" in the standing analysis, determining that in the absence of where a district does not "advertise"

that the majority opinion was "clearly erroneous" in any aspect. In fact, Circuit Judge Edmondson prefaced his dissent by "cheerfully admit[ing] that my colleagues may well be right about what is the correct result of this case." J.S. App. at 92. With this preamble, he signaled to all readers that he had no cause to claim the majority's factual findings should be reversed as "clearly erroneous."

By Appellants' failure to identify what, if any, factual findings of the District Court they contend are clearly erroneous, they impliedly accept what is abundantly clear from the record below—that all of the District Court's findings are amply supported by the evidence presented at trial.

A. Objective Criteria to Govern Application of Shaw Already Exist

The State Defendant's complain about the absence of "objective standards" with which to define a racial gerrymander. They seek more standards to help it better balance the demands of the Voting Rights Act, as enforced by the DOJ, with the constitutional rights of its citizens to be free of race based gerrymandering.[32] That

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race-based line drawing, the harm referenced in *Shaw* is absent and citizens have no basis for suit. J.S. App. 30, 42 n.24. The District Court considered a district "bizarre" where, as here, it is not compact and its lines were "blatantly manipulated". J.S. App. 32-33 n.17. Plaintiffs do not believe a separate finding of "bizarreness" is necessary either as an element of a claim or as part of standing. The fundamental issue is whether racial gerrymandering as defined in *Shaw* has occurred. The distinction, however, is more theoretical than real.

[32] The State Defendants make this argument in a strained effort to involve the recent decision in *Holder v. Hall*, 62 U.S.L.W. 4728 (1994). They argue the absence of "objective criteria" for defining racial gerrymandering somehow immunizes it from constitutional challenge. Once again, the confusion is traced to an attempt to employ the rationale of a vote dilution case to a race discrimination case. In *Holder*, the Court could find "no principled reason" to pick betewen varying sizes of a county commission. This Court has already articulated its reasons for condemning the intentional

is "statespeak" for saying the DOJ's administration of the Voting Rights Act in Georgia and throughout the South exceeded its statutory bounds. Appellants believe that, once the DOJ is returned to the oversight role that Congress intended it serve under Section 5,[33] the State will have ample "breathing room" between its obligations under the Act and the constitutional rights of citizens assigned to racially gerrymandered districts.

The defendants involved in reapportionment—Speaker Murphy and Lt. Governor Howard—had little trouble identifying racial gerrymandering. It involved an overriding racial objective advanced by abandonment of traditional districting principles and the racial division of Georgia's cities. Georgia's plight was not due to an unawareness of the fact it was racially gerymandering; it was borne of the unrelenting advocacy of the ACLU for a "Max-Black" approach to districting that the DOJ enforced via its Section 5 powers. Without *Shaw v. Reno* to warn Georgia there was a constitutional consequence to unrestrained "Max-Black" gerrymandering, Georgia chose the sure road to DOJ preclearance and avoidance of judicial redistricting under the pending malapportionment action of *Jones v. Miller*.

III. THE LEGISLATION ESTABLISHING THE ELEVENTH DISTRICT IS SUBJECT TO STRICT SCRUTINY

In this case and in *Hays*, the DOJ offers a highly restrictive view of what triggers strict scrutiny of a racial gerrymander. It argues legislative intent should not be the determinant of whether strict scrutiny applies. Instead,

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use of racial gerrymandering (in the absence of facts that would satisfy the strict scrutiny such classifications must undergo) in *Shaw*.

[33] The DOJ's contention that it can essentially litigate theoretical Section 2 claims on the uneven playing field of a Section 5 review has little legal authority to support it. Georgia has never accepted this construction of Section 5. Georgia won the point before a three judge court in *Georgia v. Reno*, Civil Action No. 90-2065 (D.D.C., Order of February 3, 1995).

it reads *Shaw* as mandating some type of "beauty contest" as a predicate to strict scrutiny.

The DOJ is mistaken. While it would be very difficult to even conceive of a congressional district that would be challenged (let alone subjected to strict scrutiny) without highly irregular features tied to race, it is the purposeful classification of citizens according to race to which the Equal Protection clause is directed. *Shaw*, 113 S.Ct. at 2824. It is these classifications that "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 2824. It is the *purpose* to divide citizens according to race which demands close judicial scrutiny. *See Croson*, 488 U.S. at 493.

A statute which draws "explicit racial distinctions" on its face will always be subject to strict scrutiny. However, merely because a statute is race-neutral on its face does not exempt it from strict scrutiny if it is, in fact, "unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Whether a facially race-neutral statute is "unexplainable on grounds other than race" is necessarily a fact-intensive inquiry. It is ultimately the legislative purpose which must be determined. The fact that the legislation at issue relates to redistricting does sion was "whether Appellants have sustained their burden not alter the essential inquiry. Indeed, in *Wright v. Rockefeller*, the question for decision was "whether Appellants have sustained their burden of proving that the boundaries of particular districts were purposefully drawn on racial lines." 376 U.S. at 67 (Goldberg, J. dissenting).

Shaw should not be limited by the DOJ's suggested reading that a district must meet some pre-determined level of overall "bizarreness" before being subjected to strict scrutiny. To the contrary, this Court indicated in *Shaw* that "a racial gerrymander, once established, should [not] receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race." *Id.* at 2826. As if to invoke the present case, the Court noted that proof of a racial gerrymander "some-

times will not be difficult at all." *Id.* Two distinct scenarios were cited. One was the situation presented in *Gomillion v. Lightfoot,* where district lines were "so highly irregular" that they could not rationally be understood as anything other than an effort to segregate voters. The second scenario "would be a case in which a state *concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness contiguity, and respect for political subdivisions.*" *Shaw, supra* at 2826-27 (emphasis added). This language does not suggest some special geometric threshold for strict scrutiny whereby a district must maintain a particular level of visual "bizarreness" throughout. To Appellees, it suggests a Court deeply concerned, not about appearance *per se,* but purposeful race-based line drawing which balkanizes our electorate and reinforces "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and vote for the same candidates at the polls." *Id.* at 2827.

Under *Arlington Heights* and *Hunter v. Underwood,* 471 U.S. 222-228 (1985), once a racial classification is shown to have been a "substantial" or "motivating" factor behind an enactment, the burden then shifts to the state to demonstrate that the law would have been enacted without this factor. For practical reasons, the District Court here added the requirement that race be the "overriding" or "predominant" force determining the lines of the district. J.S. App. 36. The Court deemed this elevated burden necessary in the redistricting context since race awareness will often impact district lines in light of the Voting Rights Act and the current attitude of the DOJ. J.S. App. 38.[34] With this elevated standard, the

[34] Plaintiffs appreciate the concerns of the District Court but do not believe it is necessary to depart from traditional equal protection analysis and the "substantial" or "motivating" test in the context of redistricting. "Properly applied, [the] distinction

Court made clear the legislature "may intentionally consider race in redictricting—and even alter the occasional line in keeping with that consideration—without incurring [strict scrutiny]. It is the *abuse* of that privilege, exposed to the world via perverse district shapes 'unexplainable on grounds other than race' that sparks further examination." J.S. App. 39.

The District Court correctly emphasized that race need not be the *sole* motivation behind a redistricting plan before it is subjected to strict scrutiny. Such a standard is fundamentally inconsistent with *Arlington Heights* and *Washington v. Davis*, 426 U.S. 229 (1976). In redistricting, as in any other area of the law, race will almost never be literally the only factor which influences legislation. The notion that an equal protection claim under *Shaw* cannot exist unless 100% of the district line is the product of racial gerrymandering would trivialize *Shaw* and immunize racial gerrymandering from established equal protection analysis contrary to the *Shaw* Court's express pronouncement that racial gerrymandering, once established, should not receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race. *Id.* at 2826.[35]

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between 'race-conscious' and 'race-based' districting should prevent legislatures from having to defend all districting plans under the strict scrutiny standard." *Shaw v. Hunt*, 861 F. Supp. at 42. In the vast majority of cases, proof of the "requisite intent will be difficult indeed." *Id.* at 433, n.20.

[35] *Arlington Heights* severely undercut the DOJ's position that only the district lines themselves can be examined in determining whether a district is subject to strict scrutiny. *Arlington Heights* calls for an "inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. In addition to examining impact, district courts are advised to examine the historical background of the decision, the specific sequence of events leading up to the challenged decision, unusual procedural or substantive departures, legislative history and legislator testimony. Contrary to the DOJ's representation, the District Court here was not left to rely on "after the fact testimony of some of the legislators who had been involved in the districting process" (DOJ Brief at 22) to ascertain legislative purpose. The Court relied primarily upon the District's dramatically irregular configuration and the racial

The District Court's unassailable findings that race dominated the formulation of the Eleventh District and that this caused a bizarre configuration "unexplainable" on grounds other than race (J.S. App. 67) renders further discussion of applicable standards largely academic. If the Eleventh District is not subject to strict scrutiny under *Shaw*, it would be difficult to conceive of a district which is.[36] It would simply be disingenuous to contend this district is not dramatically irregular in its shape, particularly if one understands Georgia's geography, compares it to decades of Georgia districting history, where compact districts had identifiable economic bases, and appreciates the predominant role of its 159 counties as the building blocks of its congressional districts. It would be equally disingenuous to deny that this dramatic irregularity is the product of anything but race.

IV. THE ELEVENTH DISTRICT CANNOT SURVIVE STRICT SCRUTINY

A. Third Parties Cannot Supply Compelling Governmental Interests Which The State Refuses To Acknowledge

The State Defendants make no offer to defend the Eleventh District once strict scrutiny applies.[37] As a self-

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divisions occasioned thereby. While legislators certainly provided compelling, uncontradicted testimony as to legislative intent, the DOJ's own communications with the State and the ensuing legislative enactments speak volumes on the subject.

[36] The State Defendants try to generate conflict between the District Court's opinion and *Voinivich v. Quilter*, 113 S.Ct. 1149 (1993) by overstating the District Court's holding to be a ". . . rejection of all benign race-conscious redistricting. . .". State Brief at p. 33. That is not a fair reading of the opinion. There is a crucial difference between race conscious districting that comports with traditional districting principles (e.g., respect for county boundaries in redistricting was constitutionally required, 113 S.Ct. at 1152) and the racial gerrymandering confronting the Court in this case. However, no equal protection issue was raised in *Voinivich* and the Court expressed no view on how such a claim might be evaluated." 113 S.C. at 1157.

[37] The State Defendants have never asserted the Voting Rights Act as a compelling governmental interest. They did once send

appointed surrogate for the State, the DOJ proffers the Voting Rights Act and "eradicating the effects of past discrimination" as compelling governmental interests justifying the race-driven configuration of the Eleventh District. (DOJ Brief, p. 39). This proffer by the DOJ raises an important issue—may a third party articulate a compelling governmental interest in defense of the State's legislative use of race classifications when the State specifically *denies* that the State considers such interest compelling and *denies* that it motivated the State to employ racial classifications?

The precedents of this Court have always called upon the State to speak for itself in asserting the basis for its actions. In *Regents of University of California v. Bakke*, 438 U.S. 265, 306 (1978), the Court stated that "to justify the use of a suspect classification, *a state must show* that its purpose or intent is both constitutionally permissible and substantial." (Emphasis added). In *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969), the court stated that "[i]n determining whether state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, *the interest which the state claims to be protecting*, and the interest of those who are disadvantaged by the classification." (Emphasis added). In *Croson*, 488 U.S. at 493 (1989), the Court noted that the "purpose of

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up the trial balloon of "proportionality" as a compelling governmental interest. This was an obvious after the fact rationalization which the District Court flatly rejected. J.S. App. 54-55. On appeal, they obliquely urge the Court to consider some intermediate standard of review. *See* footnote 29 *supra*. Justice O'Connor's majority opinion in *Croson* speaks directly to the suggestion that some "intermediate" level of review be employed where so called benign discrimination" is challenged:

"Any watered down version of equal protection effectively assures that race will always be relevant in American life and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as . . . race will never be achieved." 488 U.S. at 495 (quoting *Wygant v. Bd. of Educ.*, 476 U.S. 267, 320 (Stevens, J. dissenting).

strict scrutiny is to smoke out illegitimate uses of race *by assuring that the legislative body* is *pursuing a goal* important enough to warrant the use of a highly suspect tool." (Emphasis added). All of these cases illustrate that it is a state's responsibility to advance the interest it deems sufficiently "compelling" to justify employing suspect classifications in legislative enactments.

This Court not only requires states to articulate a constitutionally cognizable compelling governmental interest, but in the context of affirmative action insists the state justify its use of a racial classification before, rather than after, it deploys it. *See Croson*, 488 U.S. at 501; *Bakke*, 438 U.S. at 310 (states must identify specific evidence of racial discrimination before utilizing racial classifications); *Wygant v. Jackson Board of Education*, 476 U.S. at 277 (1986) (public employer must ensure that before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted). If *post hoc* rationalizations by a state are insufficient, surely *post hoc* rationalizations offered by third parties cannot pass muster. Herein, the evidence is unrefuted that the *only* "interest" driving the State prior to the passage of the 1992 redistricting plan "was to pass a plan that the Justice Department would approve." Tr. II at 66.

None of this was lost on the District Court. Its observed that the "articulated 'compelling' justifications appear to be *post hoc rationalizations*"; nevertheless, the Court "address[ed] all possibilities" and correctly found them lacking. J.S. App. at 53.

B. The Lines of the Eleventh District Are Not Arguably Necessary Under Section 5 Of The Voting Rights Act

One "compelling governmental interest" which the DOJ advances to justify its demand for three majority-minority districts in Georgia and the resulting mayhem on the Eleventh District is Section 5 of the VRA.

The District Court determined that the lines of the Eleventh District are not "reasonably necessary" under

Section 5. In so doing, it followed the "reasonably necessary" standard referenced by this Court in *Shaw*. *Id.* at 2831. The DOJ concedes that Georgia's prior submissions were non-retrogressive under *Beer v. United States*, 425 U.S. 131 (1976). It attempts to fashion an argument under the "purpose" prong of Section 5.

The notion that either of Georgia's first two submissions in 1991-92 were enacted for the "purpose" of denying or abridging the right to vote of black citizens is almost surreal. In each of these submissions, the number of majority-minority districts in Georgia *doubled* in comparison to the 1982 plan, which was also precleared.[38] No evidence was offered at trial that the legislature, by creating an additional majority-minority district, sought to *suppress* the ability of African-Americans to participate in the electoral process. Thomas Armstrong, the DOJ attorney assigned to the Georgia review team, "could not recall seeing any evidence of discriminatory motives on the part of the Georgia Legislature. Tr. IV, at 145-50." J.S. App. at 14.

Section 5 was enacted for the purpose of breaking the cycle of "unremitting and ingenious defiance" of the constitutional guarantees of non-discrimination in voting by covered states. *See Katzenbach v. South Carolina*, 383 U.S. 301, 309 (1966). The Section 5 review process is not a sword designed to force states to maximize minority voting strength. Preclearance was never intended to become a code word for proportional representation of minorities. To the contrary, the Act spe-

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[38] The DOJ cites *Bushbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) for the proposition that Georgia enacted a redistricting plan in 1982 which was motivated by a discriminatory purpose. The district lines at issue in *Busbee* and in the case at bar are worlds apart. *Busbee* involved *only* a small portion of the lines pertaining to Atlanta's Fifth District. No suggestion was made by the DOJ at that time that the failure to create even a single additional majority-minority district in the State outside metropolitan Atlanta evinced a discriminatory purpose on the part of the State. Apparently, the DOJ's *definition* of "purpose" under Section 5 has changed drastically since that time.

cifically disavows any such purpose. *See* 42 U.S.C. § 1973(b). There is nothing in the "purpose" prong of Section 5 which mandates that a state rig together in an unprecedented manner distantly located black population clusters while carefully avoiding white population in the process. The District Court has well documented the excesses engaged in by the Department of Justice, both in its misconstruction of its function in a Section 5 review and its the documented *de facto* delegation of critical preclearance decisionmaking functions to the ACLU. The State strongly protested the unprecedented approach the DOJ took to redistricting. J.A. 108, 118. Its traditional districting principles were ignored, existing districts were ripped apart and scores of cities dissected just for their black populations. J.A. 128.

The DOJ's approach can find legal footing *only* if "purpose" under Section 5 is defined to mean anything less than maximizing the number of majority-minority districts within a state. Such a grossly expansive definition has no arguable place in the law. *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994) (Kennedy, J. concurring). Yet, this is precisely the operative definition the DOJ imposed on Georgia and asks this Court to sanction.

The DOJ would have this Court jettison the "reasonably necessary" standard used for the narrow tailoring analysis as referenced in *Shaw v. Reno*, 113 S.Ct. at 2831, and followed by the District Court. J.S. App. 65. It contends that race-based districting is always narrowly tailored if the State has a "strong basis in evidence" for believing that it would not be able to prove the absence of a discriminatory purpose and that a letter from the DOJ declining to grant preclearance under Section 5 provides that "strong basis in evidence" unless its findings are "clearly insupportable." DOJ Brief, at 31.

The DOJ's argument is frightening one. It vaporizes the concept of "strong basis in evidence." Under Section 5, the DOJ is empowered to "interpose an objection" to a plan. It has no established fact-finding procedures, no

administrative hearing and no discernible standards for evaluating information. With its confidential informants, it largely operates in secret and goes to great effort to maintain that secrecy. *See* J.A. 34. The DOJ would, in effect, elevate itself to the role of final arbiter of what survives strict scrutiny, and hence, of what is constitutional. Courts, under this approach, become largely a rubber stamp.

Leaving aside for a moment the serious legal flaws in such a position, the facts will not support the DOJ's contention. The State Defendants nowhere concede they could not have demonstrated an absence of discriminatory purpose in Georgia's first two submissions. In their Jurisdictional Statement (at p. 5), they provide their own explanation for caving in which flatly *contradicts* the DOJ:

> Because of the great costs, the delays, and the uncertainties of litigation, a majority of the legislature voted against pursuing a Section 5 preclearance action in the District of Columbia District Court. It appeared that such could not have been concluded in sufficient time to allow a legislatively enacted plan to go into effect for the 1992 elections. Hence, the failure to enact the plan now at issue would likely have put the State under a court-ordered plan for the 1992 elections by default.

Even if the DOJ were somehow right as to the constitutional significance of its rejection letters, any claim of a Section 5 "purpose" violation is "clearly insupportable." While the DOJ works hard to downplay its pre-*Shaw* maximization policies and its goal of proportional representation before this Court, the record in this case is overwhelming. In practice, the DOJ seriously abused Section 5 to effectuate these policies. The District Court's characterization of the Department's conduct as "an embarrassment", "a search for maximization by the crudest means", and the pursuit of "maximization of the black vote, whatever the cost" (J.S. App. 27, 12-14 n. 4, 28) are not only correct, but they are supported—in the

State Defendants' own words—by "abundant evidence." J.S. at 3. As the District Court found, these policies led the DOJ to search for black voters in a manner which "completely ignored legitimate non-racial interests." J.S. App. 67. The District Court did not simply find that the requirements of the Voting Rights Act had been exceeded. It found the lines of the Eleventh District "unexplainable as anything other than an effort to exclude white voters" and to include black ones. J.S. App. 67. It decried the "gulf" between the VRA and the enacted plan. *Id.* Thus, even by the DOJ's own improper test, the Eleventh District cannot be justified on the basis of Section 5.

C. The Lines Of The Eleventh District Are Not Arguably Necessary Under Section 2 Of The Voting Rights Act

In offering Section 2 as a justification for the Eleventh District, the DOJ again asserts a "compelling governmental interest" which the State expressly disavows. *See* State Defendants' Trial Brief, at 30-31. Essentially, the DOJ argues that, even though the State did not appreciate it then and does not contend it now, it had a "strong basis" in evidence for believing that the Eleventh District was necessary to avoid a Section 2 violation.

The legislation establishing the Eleventh District is not arguably narrowly tailored to further compliance with Section 2. This Court's well established preconditions for a Section 2 claim in a districting case are explained in *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). A plaintiff must show the minority population is (1) sufficiently numerous and *compact* to constitute a majority in a single-member district, (2) is politically cohesive, and (3) that whites vote as a block to defeat the minority's preferred candidate. Only when a plaintiff establishes all of these preconditions must the Court determine whether, under the totality of the circumstances, minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* at 80.

The DOJ cannot get past even the first *Gingles* precondition. The minority populations in DeKalb, Richmond and Chatham Counties "are so far apart that the DOJ's insistence that they are 'compact' renders the term meaningless." J.S. App. at 80. In its quest to implement a Max-Black plan and thereby achieve "proportionality plus",[39] the DOJ was simply oblivious to the concept of compactness in the preclearance process.

Although unnecessary to the disposition of the DOJ's argument, the District Court did not limit its analysis to the first *Gingles* precondition. It assessed all of them. With respect to voting patterns among blacks and whites, the Court found "a significant degree of cross-over voting in Georgia and the Eleventh District, with white voters slightly more willing to vote for black candidates than black voters for white candidates." J.S. App. at 83. The Court further found that percentages of black voters in the Eleventh District are far more than needed to afford blacks within the district an equal opportunity to elect a candidate of choice. J.S. App. at 88.[40]

Eleventh District election results verify the District Court's conclusions. In the 1992 Democratic primary,

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[39] Measured by VAP, blacks are in fact *overrepresented* from the standpoint of proportionality by 2.68%. In *Growe v. Emison*, 113 S.Ct. 1075, 1083 n.4 (1993), this Court noted that Gingles repeatedly refers to VAP, not population and that other courts have likewise referred to VAP in Section 2 cases.

[40] The Court observed that under the analysis of Dr. Katz, the expert retained by the State Defendants, a black candidate has roughly a 73% probability of winning an election in the Eleventh District, and that this number would presumably be higher if the assessment were made on the basis of VAP. J.S. App. 88. Plaintiffs' experts, Dr. Weber, concluded on the basis of extensive election analysis that the Eleventh District in its present configuration is overly safe in the general, in the Democratic primary, and in the Democrtaic run-off elections from the standpoint of assuring the election of a candidate of choice of African-American voters. Pl. Ex. 82 at 32. His reconstituted election analysis of precincts within the Eleventh District confirms that black candidates received an average of 65.7% of the vote in ten elections. J.S. App. at 86; Pl. Ex. 84F.

the four African-American candidates collectively received 74.8% of the vote. In the 1992 run-off, the black candidate received 56.4% of the vote. In the general election, that candidate received 73.1% of the vote. Pl. Ex. 84. In 1994, there was no Democratic opposition and another romp in the general election.

The conclusion that the Eleventh District is overly safe from the standpoint of assuring the election of an African-American is bolstered by the electoral history in the other two majority-minority districts after the 1992 plan was enacted. In both the 52.33% black VAP Second District and the 57.46% black VAP Fifth District, African-Americans have prevailed in each and every congressional contest in which an African American has participated.

The Eleventh District, with its 60.36% black VAP, represents nothing more than an arbitrary and needless application of the DOJ's now-infamous 65% rule, resulting in pointless electoral overkill.[41] No law dictated the bizarre contortions of geography necessary to garner the talismanic 65% black population quota the DOJ/ACLU established as the population benchmark. Election of a black candidate became a certainty in this district.

Whatever motivations drove the DOJ and, henceforth Georgia's 1990 redistricting experience,[42] the results un-

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[41] *See* Brace, et al., "Minority Voting Equality: The 65% Rule in Theory and Practice," 10 Law & Policy 1 (1988) (concluding that such a percentage makes election of a black candidate a "certainty."). Brace concluded:

> ". . . [A]s blacks are catching up and even surpassing whites in their levels of registration and turnout . . . use of the 65 percent figure may have the same effect *as the classic gerrymander* . . . ."

[42] As to the DOJ's possible motive, *see* Aleinikoff, et al., "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*", 92 *Mich. L. Rev.* 588, 589, n.8 (1993). *See also* Pl .Ex. 70-75, 162. Thanks to the DOJ's relocation of the State's minority population into separate districts, and the resulting destruction of biracial coalitions that elected democrats, Republican's increased their number in the delegation from one in 1990 to seven as of the last election. These results confirm the thesis many

derscore Justice Brennan's warning in *United Jewish Organizations v. Carey*, 430 U.S. 144, 171 (1971)[43] regarding the dangers of allowing race to drive the creation of voting districts. The Georgia experience with linking its widely dispersed black constituents into separate districts demonstrates how the oversimplistic theory that more majority black districts equals more black political power can be contorted into nothing more than a stratagem to destroy existing biracial coalitions that are the prototypes for how society must function politically if we are to achieve color blindness in the context of governmental action.

While the DOJ is free to disagree with the District Court's factual conclusions, it has not shown them to be clearly erroneous. Given the Court's meticulous factual findings and analysis, no legitimate claim can be made that the legislation creating the Eleventh District is narrowly tailored to further any interest under Section 2.

D. The Desire To Redress The Unquantified Effects of Historical Discrimination Is Not A Compelling State Interest

The alternative compelling state interest offered by the DOJ is the remediation of the effects of historical discrimination.[44] The notion that a segregated pass will al-

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commentators suggested well before the 1990's round of redistricting. *See, e.g.*, Brace, Grofman, Handley, "Does Redistricting Aimed to Help Black Necessarily Help Republicans?", 49 Journal of Politics 69 (1987).

[43] "An effort to achieve proportional representation . . . might be aimed at aiding a group's participation in the political process . . . or, on the other hand, might be a 'contrivance to segregate' the group . . . thereby frustrating its potentially successful efforts at coalition building across racial lines." *Id.* at 172-173.

[44] It is characterized as "eradicating the effects of past dicrimination which have resulted in racially polarized voting and a diminution of the opportunities of minority voters to elect candidates of their choice." DOJ Brief, at 39. This interest ultimately merges with an assertedly compelling interest in "proportional representation." *Id.* at 40.

ways justify manipulation of a state's voting districts to fashion artificial black majorities through gerrymandering district lines finds no support in the law.[45]

The District Court flatly rejected this argument. Apart from the fact Georgia never articulated any such interest during redistricting, the District Court held that a compelling governmental interest in remedying prior discriminatory voting practices does not exist independent of the Voting Rights Act. J.S. App. 56-57. It reasoned that the Act is itself an "expansive remedial scheme imposing federal authority over much of the country's state and local voting systems." J.S. App. 57. Its reach is so pervasive that, if any state's remedial program "exceeds the requirement sof the VRA, the separate interest in further increasing minority voting strength is no longer compelling." *Id.* at 57. The District Court's analysis is correct.

Racial classifications that work to guarantee public benefits to persons based on the color of their skin have no place in this society unless they are temporary remedial measures that specifically redress the quantified damage the discrimination has caused. Racial classifications that define the boundaries of voting districts, where those boundaries are aberrational and not required by the Voting Rights Act, are incapable of meeting the constitutional test for the remedial use of what is, in its essence, racial discrimination. Once gerrymandered districts are in place, they are institutionalized through the nonretrogression principle of Section 5. Considerations such as incumbency protection and respect for the cores and boundaries of existing districts work to cement the gerrymander into the social and political foundations of the afflicted state, contrary to this Court's long standing mandate that such remedial racial classifications be temporary in nature.[46]

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[45] Mr. Chief Justice Rehnquist made the point in his dissenting opinion in *Brooks v. Mississippi*, 469 U.S. 1002, 1003 (1984).

[46] The stage whisper pervading the Intervenors' briefs is that the South, Georgia included, is still in need of "reconstruction."

Historical discrimination cannot be recognized as a "compelling states interest" in this case. It is undisputed that "the General Asembly never articulated such lofty goals during the 1990-1992 redistricting" process. J.S. App. 56. There is not one whit of evidence to suggest that the Eleventh District was "compelled" by anything other than the DOJ's commands. Tr. II, 73. Georgia's first submission to the DOJ—itself a product of the DOJ's advance warning as to how vigorously the VRA was going to be "enforced"—provides some idea of what Georgia sought to accomplish in the way of "eradicating the effects of past discrimination." It is vastly different from the current plan, and was so perceived at the time. P.I. Tr. 107; Tr. II, 69.[47]

Yet, the State's own expert witness, Lisa Handley, has done extensive research into the question of black representation in the South and the factors that impact it. *See* Grofman and Handley, "Black Representation Making Sense of Electoral Geography at Different Levels of Government", 2 Legislative Studies Quarterly, XIV, 265 (1989). She concluded that ". . . differences in *geographic dispersion* among southern and non-southern blacks . . . account[s] almost completely for the present-day pattern of differences in black Congressional representation." *Id.* at 269 (emphasis added). The study categorically ". . . ruled out . . . differences in levels of Southern and non-Southern racism or in levels of black electoral participation in the South and the non-South. The study's conclusion was ". . . once we control for urban concentrations of black large enough to form a majority of the constituency in a Congressional district, differences between the South and non-South in the degree of black Congressional representation effectively vanish." *Id.* at 269.

[47] The State Defendants argue that "the final plan . . . is fundamentally like the initial plan." State Brief, at 49. This is a startling assertion none of the people who participated in the reapportionment process agreed with. The initial plan created two majority-minority districts. The Eleventh combined black voters in Macon with black voters in DeKalb County and Augusta. Macon is approximately 90 miles away from Atlanta. Savannah is approximately 260 miles away. Moreover, ferreting out black voters in Macon and connecting them to the Second District required outrageous gerrymandering. Georgia's Attorney General surely did not see the initial and final plans as remotely similar, bitterly complaining to the DOJ that these "extension[s] . . with all of the

Georgia's 1990 Congressional redistricting experience was a case in point for the fact that the wide dispersion of Georgia's black population provided an insurmountable constitutional hurdle to the DOJ's quest for two more majority black districts. For the DOJ, the issue was not must we maximize, or even should we maximize. Instead, the test became *could* we maximize. Rather than accept the demographics as they existed, tecnology made maximization possible through cartographical gymnastics conceivable only in cyberspace.

This Court has not specifically addressed the question of whether a state has a compelling governmental interest to engage in race-based redistricting beyond what is reasonably necessary under the Voting Rights Act.[48] However, the interest being advanced here is nothing less than a call for proportional representation, as nothing else is left apart from the Voting Rights Act. The DOJ concedes as much. DOJ Brief at 40. Such a compelling governmental interest is unthinkable. The idea of designating congressional seats by race would "tend to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson v. DeGrandy*, 114 U.S.

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necessary attendant changes, violate all reasonable standards of compactness and contiguity." J.A. 108. 118.

[48] *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) was decided prior to the 1982 amendments to the VRA which incorporated a "results" test into Section 2. In *UJO*, three Justices appeared to recognize a state interest in minimizing the consequences of racial bloc voting apart from the VRA. *Shaw*, *supra*, at 2832. In the context of single-member districting, these three Justices expressly limited their approval of race-based line drawing to those circumstances where the state employed "sound districting principles such as compactness" and where members of the racial minority are "sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." *Id.* at 168. Thus, even before the analytically distinct claim in *Shaw* was recognized, the members of the Court were mindful of the abuses that lie ahead if a state's ability to "remediate" were left unbounded. See also, *UJO*, *supra*, at 171 (Brennan, J., concurring in part). They probably did not foresee the extremes technology would one day make possible.

at 2666 (Kennedy, J., concurring). "If efforts to *require* proportional representation of minorities in democratic institutions are not stopped with clarity and force, they will divide this country into patchwork of racial provinces, and ensure that elected officials represent races before they represent citizens." J.S. App. 71, citing *Holder v. Hall,* 114 S.Ct. 2598-99 (1994). This cannot become the law.

CONCLUSION

The racial gerrymander that is the soul of the Eleventh District cannot be squared with the Fourteenth Amendment of the United States Constitution. For that reason, the judgment below should be affirmed.

Respectfully submitted,

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Nos. 94-929, 94-631, and 94-797

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ZELL MILLER, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases:	Page
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	10
Davis v. *Bandemer*, 478 U.S. 109 (1986)	5
Gaffney v. *Cummings*, 412 U.S. 735 (1973)	5
McCain v. *Lybrand*, 465 U.S. 236 (1984)	13
McDaniel v. *Sanchez*, 452 U.S. 130 (1981)	13
Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982)	10
Morris v. *Gressette*, 432 U.S. 491 (1977)	13
Perkins v. *Matthews*, 400 U.S 379 (1971)	13
Rutan v. *Republican Party of Illinois*, 497 U.S. 62 (1990)	5
Shaw v. *Reno*, 113 S. Ct. 2816 (1993)	6
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)	3, 13
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975)	10

Constitution, statutes and regulation:

U.S. Const. Amend. XIV (Equal Protection Clause)	3
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
§ 2, 42 U.S.C. 1973	11, 12
§ 5, 42 U.S.C. 1973c	5, 10, 11, 12, 13, 14

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1. a. In our opening briefs in this case and in *United States* v. *Hays*, Nos. 94-558 and 94-627, we argue in some detail that the configuration of an electoral district is not subject to strict scrutiny

merely because the State intended to—and did—create the district with a majority-minority population. See U.S. Br. 17-22; *Hays* U.S. Br. 14-20. Underlying our argument is the premise that subjecting a district to strict scrutiny on that basis would, in effect, require States to place racial minority groups at a political disadvantage.

One important purpose of drawing district lines in one place rather than another is to recognize politically cohesive communities of voters. Minorities in this country—and, in particular, African-Americans—frequently constitute distinctive geographical and political communities, and the evidence of political cohesion of African-Americans in this case, see U.S. Br. 37-38, establishes that African-Americans living in the area encompassed by the Eleventh District of Georgia constitute such a community, with many common political interests.[1]

[1] The political cohesion of this minority group is explicable at least in part as a result of the political interests shared by African-Americans in the Eleventh District. Extensive evidence on that subject was presented at trial. See, *e.g.*, 6 Tr. 27-48 (testimony of Rev. Mitchell), 137-194 (testimony of Dr. Marsha Darling); see also J.S. App. 45a (referring to such evidence). The district court found such evidence at least "partially convincing," *id.* at 44a, although it expressed doubt that "the poor black populations of coastal Chatham County feel a significant bond to the black neighborhoods of metro Atlanta." *Ibid.* Nor did the court doubt that African-Americans in the Eleventh District were politically cohesive. It found that "the average percentage of blacks voting for white candidates ranged from 20%-23%," *i.e.*, 77% to 80% of African-Americans voted for African-American candidates when they had the opportunity. *Id.* at 82a. For the reasons given in our opening brief, see U.S. Br. 37 n.20, even those figures are substantially understated. Dr. Lichtman, the

To hold that the intent to create a district in which they are the majority is, for that reason alone, suspect under the Equal Protection Clause would be to place minority racial groups with distinctive political interests at a severe disadvantage in the political process. Under such a holding, a State that intentionally draws a district to recognize the voting power of a politically cohesive minority group—even a district that indisputably adheres to the State's traditional districting practices with regard to compactness, etc.—would automatically subject that district to strict scrutiny if litigation ensued. The legal uncertainty and litigation costs that would result would give the States a powerful reason not to recognize the political interests of such groups, resulting in a substantial political disadvantage to the groups whom the Equal Protection Clause was primarily designed to protect.[2]

b. Appellees in some places argue that an intentionally created majority-minority district must nevertheless be subjected to strict scrutiny under the Equal Protection Clause. For example, they state that "[u]nder [*Village of*] *Arlington Heights* [v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977),] and *Hunter v. Underwood*, 471 U.S.

United States' expert, using statewide and congressional Democratic primary elections in the Eleventh Districts, found that 65% to 97% of African-Americans voted for African-American candidates in races involving white candidates as well; in seven of the eight races analyzed, that figure was 89% or higher. See U.S. Exh. 24, tables 1-2.

[2] Minority political groups would be at an even greater political disadvantage under the district court's view that "such a [racially defined] community of interest is *barred* from constitutional recognition." J.S. App. 44a (emphasis added).

222-228 (1985), once a racial classification is shown to have been a 'substantial' or 'motivating' factor behind an enactment, the burden then shifts to the state to demonstrate that the law would have been enacted without this factor." Appellees' Br. 35. Precisely because members of a minority group are in the minority in a State's overall population, however, majority-minority districts are ordinarily created by design, not coincidence. Therefore, under appellees' approach, all majority-minority districts will potentially be subject to strict scrutiny.

Appellees claim that, under the standard they advocate, "it would be very difficult to even conceive of a congressional district that would be challenged (let alone subjected to strict scrutiny) without highly irregular features tied to race." Appellees' Br. 34. That statement is wrong. Under appellees' standard, a perfectly compact district comprising a politically cohesive majority-minority community or communities would be subject to strict scrutiny so long as the State had a choice in drawing the district lines and drew them as it did in order to provide the minority community with representation. Should appellees' standard be adopted, few majority-minority districts would avoid strict scrutiny. Indeed, appellees appear to recognize that fact when they acknowledge that, "[*f*]*or practical reasons*, the District Court * * * added the requirement that race be the 'overriding' or 'predominant' force determining the lines of the district." Appellees' Br. 35 (emphasis added). As we argue in our opening brief, however, the district court's "predominant motive" standard poses essentially that same prospect that virtually every majority-minority

district will be subject to strict scrutiny. See U.S. Br. 18-19.[3]

[3] The district court's numerous different formulations of the standard also give a hint of the analytical difficulties that would attend its application. The district court thus states variously that the test is whether race "was the *substantial or motivating consideration* in creation of the district in question," J.S. App. 35a (footnote omitted); whether race was the "*overriding, predominant force* determining the lines of the district," *ibid.*; whether race is not merely "one factor among *many of equal or greater significance* to the drafters," *ibid.*; whether "race was the most prominent element driving the legislatures' planning," *id.* at 35a n.19; and whether race was "not * * * one motivation among others of equal strength propelling the process," *ibid.*

Amici Washington Legal Foundation, et al., assert that our objections to inquiring into a legislature's "overriding" or "predominant" motive are "disingenuous coming from the federal government, which regularly engages in exhaustive examination of legislative intent in connection with its pre-clearance authority under § 5 of the Voting Rights Act." Br. 13. Our Section 5 inquiry, however, does not require identification of an "overriding" or "predominant" motive. As we explain in our opening brief, see U.S. Br. 32-34, our Section 5 inquiry looks into the possible existence of an improper legislative purpose to discriminate, employing the accepted "motivating factor" analysis derived from this Court's decision in *Arlington Heights*. There is nothing improper, however, about a legislative purpose to recognize the political interests of a racial minority group in the same way that other (and often competing) political interests are recognized in a State. For similar reasons, this Court has upheld redistricting plans that plainly were based on the political affiliations of voters, see, *e.g.*, *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), while making clear that other governmental decisions based on political affiliation are subject to heightened scrutiny, see *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 74 (1990). See generally Amicus Curiae Georgia Ass'n of Black Elected Officials Br. 12-18.

For the reasons given above and in our opening brief, we submit that the State's intent to create a majority-minority district—whether analyzed under a "motivating factor" standard or the "predominant motive" standard adopted by the district court in this case—does not alone require the application of strict scrutiny. Instead, this Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), provides the appropriate guidepost. Where the shape of a challenged district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting," *Shaw*, 113 S. Ct. at 2824, it betrays the State's intent to draw lines for the minority group that it is unwilling to draw for other politically cohesive groups. In that "rare" circumstance, *id.* at 2825, the Court has held that the State must justify its action under strict scrutiny.

2. We state in our opening brief that the test for "extreme irregularity" or "bizarreness" under *Shaw* is whether, "in drawing the district, the State departs dramatically from its traditional districting practices." U.S. Br. 14. Appellees do not appear to disagree; they state that "[r]acial gerrymandering occurs when the State draws a district that artificially manipulates non-compact dispersed minority populations into a majority black district without regard for the State's traditional districting principles." Appellees' Br. 24. But they argue that the district court's determination that the Eleventh District is "bizarre" under that standard was not clearly erroneous.

The district court, however, gave no indication that it employed the correct legal standard in reaching its conclusion. Instead, as we explain in our opening brief (U.S. Br. 25), the court approached the "bizarre-

ness" inquiry by assuming that its purpose was to uncover whether the State had an "overriding objective to include minority populations in the Eleventh [District]." J.S. App. 47a. That improper focus led the district court to give inappropriate weight to several facts that were of little or no relevance, and to disregard factors that should have guided the inquiry. See U.S. Br. 25-27. For the reasons given in our opening brief, see U.S. Br. 23-25, and by Judge Edmondson in his dissenting opinion, see J.S. App. 96a-100a, we believe that the Eleventh District satisfies the *Shaw* standard.

Appellees argue that the Eleventh District is a dramatic departure from Georgia's traditional districting principles because it splits eight counties (while leaving 14 intact) and the Georgia redistricting plan as a whole splits 31 municipalities. Appellees' Br. 14-15. As appellees concede, however, Georgia has split counties in the past. *Id.* at 15. Equally important, the current Georgia redistricting plan splits numerous counties for reasons that in many places have nothing to do with race. See U.S. Br. 24 n.7. The Sixth District, for example, is comprised of parts of five different counties and no intact counties at all. Although appellees in a footnote claim that "[t]he [Sixth] district had to split counties due to one-person one-vote and the need to maintain the majority-minority Fifth District," Appellees' Br. 22 n.21, they cite to nothing in the record to support that statement. In fact, the evidence showed that the configuration of the Sixth

District was based on a desire to achieve certain largely political goals.[4]

With respect to split municipalities, appellees also concede that Georgia's plans in the past have split municipalities for reasons other than compliance with the one-person, one-vote requirement. Appellees' Br. 15. Moreover, although they state that the current Georgia plan as a whole splits 31 municipalities, see *ibid.*, they do not state that only six of these municipalities are split by the Eleventh District.[5] Elsewhere in the plan, other districts split more municipalities for reasons that appear to have nothing to do with race.[6]

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[4] Senator Garner, who was the majority leader of the Georgia Senate, a member of its reapportionment committee, and a member of the conference committee on the reapportionment bills, and Speaker Murphy of the Georgia House of Representatives both testified that the Sixth District's configuration was due in large part to Murphy's desire that the district not include his residence. See 3 Tr. 229 (Garner); 2 Tr. 75-79 (Murphy); accord 3 Tr. 264-265 (testimony of Rep. Hanner, Chair of House Reapportionment Committee); 4 Tr. 349 (testimony of Oscar Persons). Lieutenant Governor Pierre Howard also testified by videotaped deposition, the transcript of which was admitted in evidence as Plaintiffs' Exhibit (PX) 216A, see 4 Tr. 184. Referring to the Sixth District, Howard testified that the legislature was "trying to make sure that it's as Republican as possible." PX 216A, at 95.

[5] The six municipalities are Augusta, Savannah, Milledgeville, Port Wentworth, Thunderbolt, and Washington.

[6] For example, six of the 31 municipalities on the list are in Gwinnett County and are split between some combination of the Fourth, Sixth, and Tenth districts, all of which are majority white. Those municipalities are Duluth, Lawrenceville, Norcross, Snellville, Sugar Hill, and Suwanee. The majority-white Sixth District alone splits eight municipalities,

3. Appellees argue (Br. 37-39) that, if strict scrutiny is applied to the Eleventh District, the district does not survive it, because in their view the State in this litigation has not itself advanced any interest that it considers to be compelling and that motivated it in creating the Eleventh District. In appellees' view, the State's litigation position on this issue is dispositive, even though private individuals and the United States are now also parties defendant and offer compelling interests in support of the State's position.

Appellees' view is mistaken. When applying strict scrutiny, the question is whether the challenged state action (in this case, the creation of the Eleventh District) was narrowly tailored to satisfy a compelling state interest. As a plurality of this Court stated (in a passage quoted by appellees themselves, see Appellees' Br. 38-39), "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.). The crucial question is thus whether the legislative body—not

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two more than are split by the Eleventh District. They are Duluth, Lawrenceville, Norcross, Sugar Hill, Suwanee, Marietta, Smyrna, and Woodstock. This information and that in the previous footnote are derived by locating the cities on appellees' list on a map of Georgia; appellees themselves did not introduce evidence about which districts split each of the municipalities. It should be noted that appellees' list is in any event misleading, since it omits the numerous split municipalities in the present and past plans that overlap more than one county. See 2 Tr. 138-140 (testimony of Linda Meggers).

the lawyers representing the State or state officials in later litigation—was pursuing a compelling state interest and employed means narrowly tailored to advance it. As this Court explained in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975), "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." The appropriate inquiry turns on an examination of "the statutory scheme itself and * * * the legislative history"—not the litigation positions advanced by attorneys representing one of the parties. *Ibid.* Accord *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 728 (1982).

In any event, there is no doubt that, at the time the State adopted its plan, the State believed that creating the Eleventh District was necessary to comply with Section 5 of the Voting Rights Act, and that such compliance was a compelling state interest that supported the State's action here. The State knew that the Attorney General had interposed Section 5 objections to the two previous redistricting plans, a fact that in our view is sufficient to support the State's belief that its creation of the Eleventh District was necessary to comply with Section 5. Moreover, Mark Cohen, a Senior Assistant Attorney General of Georgia, testified at trial that he advised the leadership of the state legislature that the State should not file a Section 5 declaratory judgment suit to obtain preclearance for the State's second plan, because he thought that the State would lose such a suit, as it had lost a similar Section 5 suit ten years earlier. 5 Tr. 5-6. The district court made no finding that the State did not create the Eleventh District on the basis of that belief. Thus, whatever may be the

State's position now in litigation, the state legislature that drew the Eleventh District was motivated by a desire to comply with Section 5 of the Voting Rights Act.

The state legislature also acted for the purpose of complying with Section 2 of the Voting Rights Act.[7] The district court did not suggest otherwise, but instead concluded that, in its view, the failure to draw a third majority-minority district would not have subjected the State to Section 2 liability. For the reasons given in our opening brief in this case and in *Hays*, we believe that the district court erred in undertaking a *de novo* inquiry into that issue. See U.S. Br. 28-29; *Hays* U.S. Br. 27-28. The question before the district court was not whether a court would have found Section 2 liability in a hypothetical lawsuit challenging the State's failure to create a third majority-minority district. Rather, the question was whether the objective facts considered by the State would reasonably support a conclusion that a prima facie case existed under Section 2. As we argue in our opening brief, U.S. Br. 37-38, such facts were before the legislature.

The State has also contended throughout this litigation that it acted to advance a compelling interest in affording minority voters a fair opportunity for representation, and that contention is supported by the record. See *e.g.*, 4 Tr. 239

[7] Georgia was facing a number of statewide Section 2 challenges at the time it enacted its redistricting legislation. See U.S. Br. 38 n.21. Moreover, as appellees themselves emphasize, at the time the legislature acted, it was also facing a pending suit alleging that the State's then-current redistricting plan was in violation of Section 2. See Appellees' Br. 22 n.22.

(testimony of State Rep. Brooks); PX 216A, at 55 (deposition of Lieut. Gov. Howard). Where minority voters have little opportunity to elect candidates of their choice because of racially polarized voting, the State has an interest, independent of the Voting Rights Act, in drawing majority-minority districts. See U.S. Br. 39-40. Such a situation exists in Georgia, as demonstrated both by the direct evidence of racial polarization and by the fact that, with one exception, all of the black state legislators in Georgia were elected from majority-minority districts. See U.S. Br. 37-38. Although Section 2 of the Voting Rights Act requires States to create majority-minority districts in some circumstances, nothing in Section 2 suggests that it was intended to set a limit on the extent to which States could do so.

4. Appellees argue (Appellees' Br. 39-43) that the Attorney General's Section 5 objections to the State's two earlier plans did not provide a basis for the State to believe that creating the State's final plan, with three majority-minority districts and the current configuration of the Eleventh District, was required by Section 5 of the Voting Rights Act. They base their argument on their allegation that the Attorney General's objections were meritless, and that the objections could therefore not have provided the State with a reasonable basis for believing that its actions were necessary to comply with Section 5.

As we explain in our opening brief, the question whether the Attorney General was correct in objecting to Georgia's first two plans was not before the district court.[8] Given the Attorney General's role in

[8] Notwithstanding extensive statements on the issue in its opinion, the district court on several occasions assured the

the Section 5 statutory scheme, a State must ordinarily be able to rely on a Section 5 objection as an administrative finding of discrimination that can justify remedial action by the State. See U.S. Br. 30. Moreover, to permit back-door review of the merits of a Section 5 objection in the course of a *Shaw* challenge to a districting plan is inconsistent with the statutory scheme. Congress precluded all direct review of the Attorney General's objections and channeled all litigation about the merits of those objections to a special judicial preclearance action in the District Court for the District of Columbia. See *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977); see also *McCain* v. *Lybrand*, 465 U.S. 236, 246-247 (1984); *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-151 (1981); *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971). If a Section 5 objection by the Attorney General is not clearly insupportable, it therefore provides a sound basis for the State to take action.

We argue in our opening brief that the Attorney General's objections in this case were amply supported. U.S. Br. 31-34 (citing *Arlington Heights*, 429 U.S. at 266-267). Appellees do not take issue with

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parties that it would *not* review the merits of the Attorney General's Section 5 objection. See, *e.g.*, Order of March 30, 1994, at 3 n.2 ("Plaintiffs have not petitioned the Court to directly rule on the correctness or the constitutionality of the DOJ's pre-clearance decisions."); Order of June 6, 1994, at 4-5 ("The DOJ's refusals to preclear the State's first two congressional plans submitted may not be reviewed for their correctness; those refusals and communications regarding the preclearance process for the current plan may be probative, however, insofar as they may have provided the impetus for the drawing of the plan at issue here.").

that analysis; what they offer instead is unpersuasive.

Appellees claim that the Attorney General's objections to the two earlier plans were unsound because the Attorney General was employing a mistaken "maximization" or "proportionality" standard in assessing purpose under Section 5. Appellees' Br. 40-43. As we have explained, although it may be the case that some individuals or interest groups in Georgia desired "maximization" or "proportionality," and that others brandished those terms to achieve goals of their own,[9] the Attorney General has never employed those standards in analyzing purpose under Section 5 and did not do so here. See U.S. Br. 35-36.[10]

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[9] Individuals in Georgia who have their own goals in the redistricting process are not and were not authorized to speak for the Attorney General of the United States concerning the standards to be applied in making Section 5 preclearance decisions or any other matter. Appellees' citation to statements by those individuals thus have no bearing on the issue. See, *e.g.*, Appellees' Br. 18 (quoting statement of State Rep. Tyrone Brooks), 20-21 (quoting statements of State Sen. Garner).

[10] Appellees quote the district court's statement that Thomas Armstrong, an attorney for the Department of Justice, testified that he "could not recall seeing any evidence of discriminatory motives on the part of the Georgia legislature." Appellees' Br. 40. See J.S. App. 13a n.7. The precise question asked of Mr. Armstrong was whether he could "recall * * * a single piece of evidence that would suggest that * * * *the failure to go to* [*Savannah*] was originally based on * * * discriminatory motives, other than the mere fact that it could be done." 4 Tr. 148-149 (emphasis added). He responded that he could not recall any such evidence. 4 Tr. 149. It was undisputed, however, that Mr. Armstrong's responsibilities did not include examining the purpose issue in this case. See 4 Tr. 149. Therefore, Mr. Armstrong's

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For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1995

statement at trial does not cast doubt on the validity of the Section 5 objections in this case.

No. 94-631
No. 94-797
No. 94-929

FEB 21 1995

IN THE

Supreme Court of the United States

October Term 1994

MILLER, *et al.*,

Appellants

v.

DAVIDA JOHNSON, *et al.*,

Appellees.

ABRAMS, *et al.*,

Appellants,

v.

DAVIDA JOHNSON, *et al.*,

Appellees.

UNITED STATES,

Appellant,

v.

DAVIDA JOHNSON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
INTERESTS OF AMICUS CURIAE		1
ARGUMENT		1
I.	SUMMARY OF ARGUMENT	1
II.	MINORITY-MAJORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING AN INTEGRATED POLITICAL SYSTEM	3
	A. The Central Purpose of Single Member Congressional Districts Is to Achieve Representation of Minority Groups	5
	B. Groups Defined by Reference to Religious, Racial, Ethnic, and Socioeconomic Status Form the Building Blocks of Our Pluralist Democracy	6
	C. Given Present-Day Political Realities, Genuine Integration Requires the Use of Minority-Majority Districts	15

Page

III. MINORITY-MAJORITY DISTRICTS LIKE GEORGIA'S DISTRICT ELEVEN NEITHER SEGREGATE VOTERS NOR IMPAIR FULL REPRESENTATION OF ALL CONSTITUENTS' INTERESTS 20

A. Contrary to the Suggestion of Segregation, the Challenged Congressional Districts Are Among the Most Racially Integrated Districts in the Nation 20

B. The Representatives Elected From the Challenged Districts Faithfully Represent the Interests of All Their Constituents 22

C. Minority-Majority Districts Do Not Increase Racial Polarization 23

CONCLUSION 24

Appendix A 27

TABLE OF AUTHORITIES

CASES *Page(s)*

Ballard v. *United States*, 329 U.S. 187 (1946) 12

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 7

Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 4, 7

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Davis v. *Bandemer*, 478 U.S. 109 (1986) 2, 6

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Hobbs v. *Fogg*, 6 Watts 553 (Pa. 1837) 8

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Mitchell v. *ICC*, 313 U.S. 80, (1941) 8

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Page(s)

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Shaw v. *Reno*, 113 S. Ct. 2816 (1993) 2, 3, 8, 9, 15, 20, 22

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 7

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The Civil Rights Cases, 109 U.S. 3 (1883) 8

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Cornel West, *Race Matters* (1993) 25

27 *Eighteenth-Century Studies* No. 4, *Special Issue: African-American Culture in the Eighteenth Century* (1994) 10

INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of all forty African Americans who have been elected to the House of Representatives and, in addition, Carol Mosely Braun of Illinois, a member of the United States Senate. The issue as to how congressional boundaries are drawn in Georgia and throughout the nation could affect directly twenty or more members of the present Caucus and millions of African Americans and other minorities who reside in the minority-majority districts where the issue has been or may be raised. The Caucus filed an *amicus* brief in the proceedings below, and all counsel have consented to the filing of this *amicus* brief.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that the minority-majority districts in issue in this and related cases are indispensable in the fight for full integration of the American political landscape. Minority-majority districting is only a specific illustration of the more general goal of *all* districting, particularly single-member districting: it is intended to allow the direct representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of American history and contemporary reality, minority-majority districts are often the only way of fully achieving the pluralist aspirations of American politics and remedying the longstanding exclusion of African Americans from full participation in government. Moreover, the use of minority-majority districts, like Georgia's District Eleven and the other minority-majority districts represented by members of the Caucus, shows that these districts have not resulted in the harms this Court feared from race-conscious districting; the challenged districts do not segregate voters on the basis of race, and representatives from minority-majority districts fairly represent the interests of *all* their constituents—regardless of race.

This Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), nevertheless has unleashed a torrent of litigation challenging minority-majority congressional districts drawn after the 1990 census. In three cases, lower federal courts have used *Shaw* as a roving warrant to flout Congress's commitment to full integration of the political system. In so doing, these lower courts have disregarded this Court's reluctance to interfere in the intensely political process of districting, which inevitably involves "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Shaw reflects this Court's hopes and its fears about the American political system. *Shaw* confirms this Nation's deep commitment to integration of the political system. The Fourteenth and Fifteenth Amendments to the Constitution expressly pledge to eradicate the political exclusion of racial minorities, particularly African Americans. *See Shaw*, 113 S. Ct. at 2822-31. This constitutional command underlies the Voting Rights Act of 1965, which gives all Americans an "equal opportunity to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988). Moreover, as *Shaw* recognizes, the political system should ensure that elected officials are responsive to the needs of all of their constituents; no official should ignore the distinctive needs of the citizens he or she represents because of their race. *See Shaw*, 113 S. Ct. at 2827. Finally, *Shaw* expresses an aspiration for American politics to become less race-conscious and polarized. *See id.* at 2827, 2832.

At the same time, *Shaw* sets forth several reservations about the deliberate creation of irregularly-shaped, minority-majority districts. *Shaw* foresees two potential dangers in such districts. *First*, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group rather than their constituency as a whole." *Id.* at 2827. *Second*, to the extent that such districts reinforce stereotypes about racial distinctions, they may

"exacerbate...patterns of racial bloc voting," *id.*, and further polarize American politics.

It is the position of the Caucus that the opinion and order of the *Johnson* trial court is inconsistent with this Court's opinion in *Shaw*. The lower court failed to recognize that the challenged minority-majority district meets the aspirations for the American political system identified in *Shaw*. Further, the court below failed to assess the fears noted in *Shaw*. Such inquiry would have revealed that Georgia's District Eleven does not present either danger but rather moves toward the realization of this Court's, indeed the Constitution's, aspirations for American democracy. The lower court decision should be reversed. If, however, the Court concludes that the decision below is consistent with or required by *Shaw*, we submit that the *Shaw* decision was "wrongly decided," and should be revised.[1/]

II.

MINORITY-MAJORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING AN INTEGRATED POLITICAL SYSTEM

For far too long, this nation was unresponsive and often hostile to the needs of its African-American citizens. Prior to Reconstruction, and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. By 1901 (the end of the First Reconstruction), the massive disfranchisement of African-American voters through fraud, intimidation, and a variety of invidiously discriminatory

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[1/] In *Fullilove* v. *Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy* v. *Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided."). For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick & M. David, *Shaw* v. *Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

devices (such as poll taxes and literacy tests) had entirely purged Congress of African-American members. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944 there was but one. And the voice of Congress's sole African-American representative from 1935 to 1943, Arthur Mitchell of Illinois, was all but silenced by the antagonistic posturing of his white colleagues—some of whom were members of his own party.[2/]

The consequences of the exclusion of African Americans from voting and thus from Congress were painfully visible, even after World War II, as Congress consistently worked to advance the interests of the white majority at the expense of minority groups. Thus, for example, in 1957 southern congressmen almost uniformly joined the "Southern Manifesto," rejecting the doctrine of *Brown* v. *Board of Education* and adhering solely to the interests of those white constituents who wanted to maintain segregation in America—to the detriment of a significant African-American southern population.[3/]

Georgia's District Eleven and other challenged minority-majority districts have served to move America beyond this deplorable history and toward the ideal of a representative demo-

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[2/] During the Democratic Party convention of 1936: "Congressman Mitchell's presence on the podium...was used as an excuse for a U.S. senator from South Carolina and eight other delegates to stage a walkout in protest. But even that demonstration was mild compared to what had happened in previous conventions...." William L. Clay, *Just Permanent Interests: Black Americans in Congress: 1870–1991* 72 (1992). *See* Note 9, *infra*, discussing other indignities Mitchell experienced.

For a list of African Americans who have served in Congress, *see* Appendix A hereto.

[3/] Nineteen senators and 83 representatives from the South, with approximately 9 million African-American constituents, joined the Manifesto. *See* Norman Dorsen *et al.*, 2 *Political and Civil Rights in the United States* 625 n.2 (4th ed. 1979) (for history of manifesto); George T. Kurian, *Datapedia of the United States: 1790–2000* 18–26 (1994) (for southern population).

cracy, one that encourages the inclusion of *all* Americans in political discourse. Progress has been slow in coming. Indeed, only after the 1992 congressional elections did the number of African-American members of Congress rise from 26 to 40. Absent the minority-majority districts that facilitated this change, however, America cannot realistically hope soon to achieve a racially integrated legislature that adequately allows for the expression of the experiences and views of *all* Americans. Decisions such as the district court's opinion in this case ignore the crucial importance of achieving a racially integrated legislature in a multiracial nation.

A. The Central Purpose of Single Member Congressional Districts Is to Achieve Representation of Minority Groups

Nothing in the Constitution requires congressional representatives to be elected from single-member districts. Nevertheless, single-member districting, which has been required by federal statute since 1842, serves a critical function: the direct representation in Congress of communities with distinct political interests that otherwise would be unrepresented were elections conducted on an at-large basis. Single-member districts promote a diversity of experience, insight and outlook in Congress that both results in better and more representative lawmaking and promotes citizen confidence in the legitimacy of the legislative process.

Single-member congressional districts were first mandated by the Reapportionment Act of 1842. This Act advanced James Madison's notion that single-member districts would best allow for the representation of local communities. As Madison explained in Federalist Paper 56:

> Divide the largest state into ten or twelve districts and it will be found that there will be no peculiar local interest...which will not be within the knowledge of the Representative of that district.

Indeed, the committee forwarding the 1842 Act explicitly intended the single-member districts to enable minorities to have representation in the face of differing majorities. That committee explained:

> [At-large elections] stifl[e] the voice and smother[] the opinions of minorities...thus disfranchised by the overbearing insolence of a majority, always meager, and as it grows leaner growing more inexorable and oppressive.

H.R. Rep. 909, 27th Cong., 2d Sess. at 8 (1842).

Thus the overriding purpose of single-district voting is to enhance pluralism in Congress by promoting the grouping and political participation of various communities in American democratic life. Georgia's District Eleven and other challenged minority-majority districts advance this purpose, by including the views and protecting the interests of a distinct minority group, African Americans. Only a pluralistic Congress—one that includes the presence of legislators of various backgrounds—can fairly ensure that all appropriate interests are considered, as the government forges policies that dramatically affect the lives of all American citizens, including those who are members of minority groups.

B. Groups Defined by Reference to Religious, Racial, Ethnic, and Socioeconomic Status Form the Building Blocks of Our Pluralist Democracy

As Justice O'Connor recognized in her concurring opinion in *Davis v. Bandemer*, 478 U.S. 109, 147 (1986), the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." In the context of America's unique history, it is essential that this Court recognize that African Americans often form a community with distinct political interests.

One key source of African Americans' commonality of interests is, of course, this Nation's lamentable history of overt racial discrimination.[4] African Americans were enslaved,[5] and later denied the rights to purchase property or live in certain areas,[6] learn,[7] work,[8] travel with dignity,[9]

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[4] *See generally* John Hope Franklin, *From Slavery to Freedom* (7th ed. 1994); Gunnar Myrdal, *An American Dilemma* (1944).

[5] *See Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857) ("[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted ... [African Americans] had no rights which the white man was bound to respect."); *see also* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 6 (1978).

[6] *See Buchanan* v. *Warley*, 245 U.S. 60, 79 (1917) (municipal racial segregation law); *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948) (racially restrictive covenant); *see also* John Hope Franklin, *supra* note 4, at 311; A. Leon Higginbotham, Jr., F.M. Higginbotham and S.S. Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 Univ. Ill. L. Rev. 763 (1990).

[7] *See Cumming* v. *Board of Educ.*, 175 U.S. 528, 545 (1899) (Board of Education suspended "for economic reasons the high school for colored children"); *Gaines* v. *Canada*, 305 U.S. 337, 352 (1938) (black citizens of Missouri denied the right to attend the only state supported law school); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (racial segregation in public schools); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools).

[8] *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (blacks denied membership in labor union on account of race); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (racially discriminatory bargaining agreement); *see also* John Hope Franklin, *supra* note 4, at 235.

[9] Even the one African-American in Congress in the 1930s was denied the right to travel with dignity. As Congressman Arthur Mitchell testified, after he identified himself as a U.S. Congressman to a train conductor in

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marry,[10] and vote,[11] simply because of the "color of their skin." *Shaw*, 113 S. Ct. at 2827.

Nor is this legacy ancient history. The continuing effects of this state-sponsored history of slavery, *de jure* segregation, brutality, and exclusion from voting persist. Many middle-aged African Americans attended inferior, racially segregated schools and their substandard educations continue to hamper their ability to compete in the workforce, to afford adequate housing, and to participate effectively in the political process.[12] Even today, white attitudes hardened by state-sponsored *de jure* segregation often result in racially polarized voting and contribute to discrimination in employment, housing, public accommodations, and a variety of other circumstances.

Federal legislation has been an essential weapon in the fight to remedy the effects of this past and continuing racial discri-

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[9](...continued)
Arkansas, the conductor said "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in [the first class] car." Record of the United States Supreme Court, *Mitchell* v. *ICC*, 313 U.S. 80 (1941) (No. 577), at 79, and *Mitchell* v. *ICC*, 313 U.S. 80, (1941) (denial of "separate but equal" first-class railroad accommodation to African Americans); *see also Plessy* v. *Ferguson*, 163 U.S. 537, 540 (1896) (Louisiana's racial segregation of railroad passengers); *The Civil Rights Cases*, 109 U.S. 3 (1883) (denial of "separate but equal" first-class railroad accommodation to African Americans).

[10] *See Loving* v. *Virginia*, 388 U.S. 1 (1967) (Virginia's anti-miscegenation statute).

[11] *See Hobbs* v. *Fogg*, 6 Watts 553 (Pa. 1837) (African Americans in Pennsylvania denied the right to vote on account of race); *Giles* v. *Harris*, 189 U.S. 475 (1903) (Alabama Constitution denied African Americans the right to vote on account of race); *see also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (setting out history of racial discrimination in voting).

[12] *See* John Hope Franklin, *supra* note 4, at 405-32.

mination, and Congress's use of its Fourteenth and Fifteenth Amendments and Commerce Clause powers to fight for racial justice has been a significant element of the legislative agenda of the past three decades.[13] Americans of all races have supported these remedial measures. Nevertheless, African-American constituents, witnesses, and representatives have been in the forefront of these legislative efforts.

Even beyond their generally cohesive support for certain explicitly race-conscious legislative measures, African Americans often form a discrete community. Recognition of this thread of shared interests does not involve the type of pernicious stereotyping referred to by this Court in *Shaw* or the court below. *See* 113 S. Ct. at 2827; App. at 46. African Americans, enslaved and segregated because of their race, were excluded from the dominant American culture and forced to develop distinct cultural traditions, woven together from the strands of the disparate African traditions of their homelands. The result is indubitably, uniquely, and recognizably African American. It includes the literature of Richard Wright, Ralph Ellison and Toni Morrison, the poetry of Phyllis Wheatley and Langston Hughes and art forms such as blues, gospel

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[13] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.* (1988)); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 *et seq.* (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e (1988)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 *et seq.* (1988)); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. § 5001 *et seq.* (1988) (repealed in part 1993)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (to be codified at 42 U.S.C. § 3601 *et seq.*); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.).

and jazz.[14] African-American culture is also uniquely expressed in painting, sculpture, film and dance. Similar to other ethnic, religious, and occupationally-defined groups, African Americans, who share a common cultural heritage, often share a common perspective on many issues the government faces—ranging from political solidarity with the people of certain foreign countries to support for particular foreign and domestic, economic and cultural policies.

There are numerous examples of how commonality of culture influences American politics. Over the years, Irish-American members of Congress and representatives from constituencies with significant Irish-American populations have developed particular interest and expertise in issues connected with Northern Ireland.[15] Similarly, Jewish-American legislators and representatives with large numbers of Jewish-American constituents have been especially active in issues involving the Middle East.[16]

Like these other minority groups, in recent years, members of the Caucus have labored to advance interests of particular concern to African Americans. Caucus members thus have taken a

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[14] *See generally* 27 *Eighteenth-Century Studies* No. 4, *Special Issue: African-American Culture in the Eighteenth Century* (1994); Talmadge Anderson, *Introduction to African American Studies* 251-82 (1993); Roger D. Abrahams, *Singing the Master: The Emergence of African American Culture in the Plantation South* (1992).

[15] For example, Sen. Edward Kennedy, of Massachusetts, has often spoken out regarding affairs in Northern Ireland. *See, e.g., Dublin Journal: A Kennedy Pleases the Irish, Piques Some Envoys*, N.Y. Times, July 29, 1994, A4; *Political Leader of I.R.A. Begins a Tour of the U.S. in Boston*, N.Y. Times, Sept. 25, 1994, at 13; *Bay State Delegation Arrives in Ireland to Meet Leaders*, The Boston Herald, Dec. 11, 1994, at 2.

[16] For example, Rep. Charles Schumer, of New York, has regularly promoted favorable relations with Israel. *See, e.g., Baxter International Settles Boycott Case—Firm Fined $6 Million for Aiding Arab League*, Wash. Post, Mar. 26, 1993, at D1.

leading role in debating American policy with regard to South Africa and Haiti. For example, the Caucus successfully pressed for a more equitable application of American foreign policy to the Haitian refugee crisis, by bringing to the fore the disparity between the Clinton Administration's policy with respect to the treatment of Cuban and Haitian immigrants. The Caucus's role in such affairs is appropriate and critical.[17]

Similarly, on the domestic front, the Congressional Black Caucus worked to raise concerns about the fairness of the recent crime bill. Ultimately, most African-American representatives voted in favor of the bill, even though a Caucus-sponsored amendment concerning racism in death penalty sentencing was defeated.[18]

But the importance of having a racially integrated Congress in a multi-racial society goes far beyond African-American representatives' decisive role in a few identifiable debates of particular importance to the African-American community. As this

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[17] *Cf. Haitian Refugee Center, Inc.* v. *Baker*, 112 S. Ct. 1245, 1246 (1992) (Thomas, J., concurring in denial of *certiorari*) (the matter of Haitian refugees "must be addressed by the political branches").

A similar dynamic is evident with regard to female representatives. Last year's debate over whether the naval commander in charge during the infamous "Tailhook Scandal" should be retired at full rank provides an example of the significance of even a small coalition of women: it transformed what otherwise would have been a *pro forma* exchange into a national debate on gender relations. *See* Maureen Dowd, *Senate Approves a 4-Star Rank for Admiral in Tailhook Affair: 54-43 Vote Followed Heated Debate on Floor*, N.Y. Times, Apr. 20, 1994, at A1, B10. The further representation of women's interests—by women—in the Senate would no doubt have further altered the tenor and perhaps the outcome of that debate.

[18] *See The Crime Bill: The Roll Call of the House on the Crime Measure*, N.Y. Times, Aug. 22, 1994, at B6; K. Seelye, *Provision on Racial Bias in Death Sentence Appears Unlikely for Crime Bill*, N.Y. Times, July 14, 1994, at D3.

Court has repeatedly emphasized in cases involving juries, the very notion of "representativeness" requires that no significant group be excluded from the deliberative process. As Justice Marshall explained in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972):

> We are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded...the effect is to remove from the...room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury [or Congress] of a perspective on human events that may have unsuspected importance in any case that may be presented.[19/]

[19/] This Court's frequently cited discussion in *Ballard* v. *United States*, 329 U.S. 187, 193-94 (1946), with respect to juries and gender equally pertains to legislatures and race:

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

See also Taylor v. *Louisiana*, 419 U.S. 522, 531-32 (1975) (quoting *Ballard*).

Indeed, in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (emphasis added), Justice O'Connor recognized that in the context of jury deliberations, "[w]e know that *like race*, gender matters...[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them." Thus, African-American representatives perform an essential function in the deliberative processes connected with the proposal, assessment and enactment of legislation of all kinds.

Moreover, as the jury cases make clear, an African-American presence may also be essential to public perceptions of congressional legitimacy. *See J.E.B.*, 114 S. Ct. at 1429; *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991) (jury service "ensures continued acceptance of the laws by all of the people"). Again, a foreign policy issue illustrates the point. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[20] Increasing the number of African-American legislators in Congress is essential to the perceived legitimacy of the decisions that that body makes, particularly those which disproportionately affect the lives of African-American citizens.

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[20] As noted by the New York Times:

> Close to 30 percent of the Army's troops in Operation Desert Storm are black, though blacks are just 14 percent of the nation's population between 18 and 24. In a land war, black casualties will be similarly disproportionate. Is it fair? Is it inevitable? For answers, one must search the soul of American society.

The Killing Fields Aren't Level, N.Y. Times, Jan. 28, 1991, at A2.

Failure to ensure pluralism also limits the input of diverse outlooks in congressional debate, impairing Congress's insight into the problems facing the Nation. Such diverse input is crucial to combating the preconceived notions and unconscious prejudices of legislators. Pluralism thus permits the mutual education of individuals. Minorities learn of the concerns and fears of majorities, while majorities learn of the lives of others and experiences that they may well be unable to imagine. And, we believe, over time, more inclusive legislative bodies will enact laws that will increase integration within society.

Of particular salience to the case before the Court is the fact that the commonalities of African-American culture and political interests permeate the community of Georgia's African Americans. The political cohesiveness of Georgia's African-American population has been well documented. *See, e.g., Hall v. Holder,* 955 F.2d 1563, 1573 (11th Cir. 1992), *rev'd on other grounds,* 114 S. Ct. 2581 (1994); *City of Carrollton Branch of the NAACP v. Stallings,* 829 F.2d 1547, 1559 (11th Cir. 1987), *cert. denied,* 485 U.S. 936 (1988). It is, of course, no surprise since Georgia's African-American citizens are disproportionately undereducated, living in poverty, unemployed and ill-housed. Indeed, the court below had "no doubt that black citizens share concerns related to their conditions as black, e.g., the unusually high crime rate in black communities or combatting racism." (App. at 46)

Despite this clear community of interest, the court below refused to consider the "past and present reality" of the African-American experience, including the commonalities of that experience. *Thornburg* v. *Gingles,* 478 U.S. 30, 45 (1986). Rather, the trial court held that "while partially convincing, such a community of interest is barred from constitutional recognition." (App. at 45) However, in this view, *only* African Americans are barred from creating districts that empower their community. Apparently, in the lower court's view, other racial, ethnic, and religious groups are entitled to have their common interests recognized and to have congressional districts drawn to forward those interests while African Americans may not. This view turns

the Fourteenth Amendment completely on its head: the original intended beneficiaries of the Fourteenth Amendment—African-American slaves and their descendants—would be punished by that very Amendment. This is not the law and the Court must unequivocally reject the lower court's infirm logic.

C. Given Present-Day Political Realities, Genuine Integration Requires the Use of Minority-Majority Districts

As we have already pointed out, between the end of Reconstruction and the passage of the Voting Rights Act, Congress, like most other American institutions, was racially segregated. African Americans were almost entirely excluded. Moreover, as this Court recognized in *Shaw*, the formal enfranchisement of African Americans after 1965 did not actually remedy continued African-American exclusion from the halls of government. *See Shaw*, 113 S. Ct. at 2823; *see also Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994). Districting practices interacted with racial bloc voting to dilute the voting strength of African-American voters residing within majority-white districts.

As *Shaw* recognized, all districting is race-conscious "in that the legislature is always *aware* of race when it draws district lines...." 113 S. Ct. at 2826. Yet, because there are no dispositive districting criteria that require that one set of districts be chosen over all other possible plans, absent intentionally created minority-majority districts, it is statistically unlikely that even a few, if any, minority-majority districts would be created.[21/] And the brutal truth of contemporary American politics is that, absent minority-

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[21/] This point is not undermined by the statement in *Wright* v. *Rockefeller*, 376 U.S. 52, 56-58 (1964), relied on by this Court in *Shaw*, 113 S. Ct. at 2826, that it would have been difficult to draw congressional districts in Manhattan without "concentrations of nonwhite voters." While it might have been difficult to create four districts with equal proportions of nonwhite voters, it would have been entirely possible to create four districts all of which had a white majority.

majority districts, African-American representation would virtually disappear from Congress. There are 40 African-American members of the House of Representatives. Only two were elected from majority-white districts. Not a single African-American representative from the Deep South states covered by Section 5 of the Voting Rights Act was elected from a majority-white district.

This pervasive phenomenon describes state legislative elections as well. A recent exhaustive scholarly study of the impact of the Voting Rights Act showed that during the 1980's only *one percent* of majority-white southern state legislative districts elected African American representatives. By contrast roughly a quarter of African-American majority districts elected white representatives.[22/]

Georgia is no exception to this lamentable pattern of racial bloc voting.[23/] Indeed, Georgia provides a textbook example of

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[22/] *See* Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 335, 345 (C. Davidson & B. Grofman eds. 1994).

The absence of African-American representatives from majority-white districts cannot be ascribed to the placement of all African-American voters in minority-majority districts. A significant number of African-American voters live in majority-white districts, *see id.* at 338, but such districts nonetheless elected only white representatives almost without exception, *see id.*

[23/] The prevalence of racial bloc voting in Georgia is the latest manifestation of Georgia's post-Reconstruction effort to disfranchise African Americans. For extensive discussions of Georgia's voting history, *see generally* V.O. Key, Jr. *Southern Politics in State and Nation* (1950); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974).

(continued...)

the necessity of race-conscious minority-majority districting to achieve integration of the political process. Since passage of the Voting Rights Act, with only occasional exceptions, elections in Georgia in which voters have had a choice between black and white candidates have been polarized on the basis of race, undermining the possibility of black candidates being elected. One study has demonstrated that 86% of whites vote for the white opponent of an African-American candidate in all instances.[24]

White candidates who have faced African-American opponents often have exploited racially polarized voting by emphasizing the race of their opponent. Former Georgia State

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[23](...continued)
In 1877, Robert Toombs, the leader of the Georgia constitutional convention, declared, "Give us a convention, and I will fix it so that white people shall rule and the Negro shall never be heard from." Laughlin McDonald, Michael B. Binford & Ken Johnson, "Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, at 68 (C. Davidson & B. Grofman eds. 1994). The ensuing convention made good on Toombs's promise: it instituted a "cumulative poll tax" that required proof of payment of past as well as present poll taxes as a condition for voting, striking at the ability of blacks to vote until it was abolished in 1945. *Id.* The complete removal of African Americans from Georgia's politics came to fruition in 1908, with the Disfranchisement Act. For a detailed discussion of passage of the Act, *see* D. Grantham, Jr., *Hoke Smith and the Politics of the New South* 158-62 (1958). This scheme—with armed service, literacy and "good character" prerequisites for registration—was "specifically designed to prevent Negroes from voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-11 (1966).

These impediments stripped African Americans of the right to vote in Georgia through the middle of the 20th century. On the eve of adoption of the Voting Rights Act in 1965, fewer than one-third of voting-age blacks in Georgia were registered. The disparities were even greater in the state's 23 counties with black voting-age majorities, where an average of 89% of whites but only 16% of blacks were registered. *See* L. McDonald, *supra*, at 67.

[24] *See* L. McDonald, *supra* note 23, at 85.

Senator and Labor Commissioner, Albert J. Scott, testified in the trial below that white candidates facing African-American opponents have intentionally made race an issue.

> [I]n many cases, you will find that [a white candidate] will take out a paid ad. And if you don't want to run one yourself, he'll run it for you, and put an ad in the paper with your picture and everything else to make certain that... people with leanings that perhaps wouldn't be in your favor [ ] recognize the fact that without a doubt you are black. That takes place all the time.[25]

Further, as courts have regularly recognized, continuing voting registration disparities between African Americans and whites, which also minimize the effectiveness of African-American voting, are the product of the lingering effects of historic discrimination in voting. *See, e.g., Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-60 (E.D.N.C. 1984), *aff'd in part sub nom., Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

African-American political participation in Georgia also has been minimized through districting practices. In 1971, the legislature enacted a congressional districting scheme that divided the cohesive black population of Atlanta into two districts. Only after a legal challenge the following year did the legislature amend the scheme to create a district composed 44% of African Americans. Although Andrew Young was elected to Congress from

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[25] Trial Transcript, Vol. VI at 79, July 27, 1994; Generally, black candidates in Georgia have succeeded (other than in minority-majority districts) only by minimizing their racial identity. For example, Robert Benham, the first black to win statewide office in Georgia, was elected to the Court of Appeals in 1984 and the State's Supreme Court in 1990, with a strategy of obscuring the fact that he is African American. In white communities, Benham did not circulate campaign literature with his picture. Nor did Julian Bond, Jesse Jackson or anyone in the civil rights community campaign for or publicly endorse him. *See* L. McDonald, *supra* note 23, at 85.

this district in the ensuing election (becoming the first African-American representative to serve from Georgia in more than a century), no other African American has succeeded in a congressional election in a district where the majority of the voting-age population was not African American. *See Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

After the 1981 census, the Georgia legislature again attempted to limit the effectiveness of African-American voters, creating only one (of ten) minority-majority district. This plan, invalidated by a district court, was the product of intentional discrimination. Among other things, in the process of adopting the discriminatory plan, Joe Mack Wilson, chairman of the House Reapportionment Committee, stated to his colleagues: "I don't want to draw nigger districts." *Id.* at 501.

The bottom line is this: from our own experience, the members of the Caucus have seen the tangible and intangible differences the presence of substantial numbers of African Americans make in the work of Congress. We also know, as practical politicians aware of the voting behavior of citizens inside and outside our districts, that minority-majority districts in Georgia and elsewhere are the only way of providing African-American voters with an opportunity to elect the representatives of their choice. Thus, if the American political system is to achieve real integration at all levels of the political process while continuing to use single-member districts to elect congressional representatives, race-conscious minority-majority districts are essential.

III.

MINORITY-MAJORITY DISTRICTS LIKE GEORGIA'S DISTRICT ELEVEN NEITHER SEGREGATE VOTERS NOR IMPAIR FULL REPRESENTATION OF ALL CONSTITUENTS' INTERESTS

Shaw identified several potential dangers that the deliberate creation of "bizarre," "highly irregular" or "tortured" minority-

majority districts might cause. *See Shaw*, 113 S. Ct. at 2825-27. For the reasons set out at length in the State's brief and in the dissenting opinion below (App. at 92-101), the Caucus believes that Georgia's District Eleven does not fall within this suspect category; that district adheres to many traditional districting criteria and is no more irregular or bizarre than a multitude of other congressional districts. Nevertheless, an assessment of the fears noted by the *Shaw* Court—an assessment all but abandoned by the court below—reveals that Georgia's District Eleven does not foster any detrimental result.

Shaw's use of the word "segregate" makes clear the Court's concern that race-conscious districting may somehow separate voters by race and limit voters' decisions about whom to support and how to conduct their everyday affairs, as well as affect public officials' behavior after an election is over. The Caucus submits that, under current conditions, neither Georgia's District Eleven nor the other minority-majority districts challenged in the wake of *Shaw* in fact give rise to the potential harms hypothesized by the Court.

A. Contrary to the Suggestion of Segregation, the Challenged Congressional Districts Are Among the Most Racially Integrated Districts in the Nation

Large numbers of whites and African Americans live in racially segregated neighborhoods. This neighborhood-level segregation is the product of many factors, including past and present racial discrimination, as well as varying economic opportunity. Not surprisingly, then, many congressional districts are racially segregated. Their populations are either overwhelmingly white, African American or Hispanic.[20] Ironically, neither this

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[20] For example, 28 congressional districts in the South are more than 90% non-Hispanic white. *See* David Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order* 26 (The Joint Center for Political and Economic Studies 1994).

nor any other pending voting rights case has challenged the legality of these districts based on their segregated characteristics.

Rather, districts such as Georgia's District Eleven are under siege. District Eleven, and the other challenged minority-majority districts, however, are among the *least* segregated districts in the Nation. Unlike the vast majority of congressional districts, these districts are racially diverse rather than homogeneous. Indeed, only slightly more than half of that district's voters—60%—are African American, while 40% are white.

Other challenged districts are no less integrated. North Carolina's Districts One and Twelve, both maligned as segregated, are similarly integrated, each with voting age populations of approximately 53% African American, 46% white and 1% Hispanic. Texas' District Eighteen is a coalition of voters: 49% African American, 37% white and 14% Hispanic, and District Thirty is similarly integrated. The distribution of the voting-age residents of Louisiana's Fourth District is 55% African American and 45% white. When these districts are compared to some of their white-majority counterparts, such as North Carolina's Fifth, which is 85% white, or Texas's Eleventh, which is 89% white, or Georgia's Ninth, *which is 94.9% white*, the integrated nature of these districts and of District Eleven is clear.[27]

Georgia's District Eleven is not segregated. Any other conclusion implicitly endorses a view that: *districts that have even the slightest majority of African Americans are segregated, while white-majority districts are integrated.* This Court must unequivocally reject this pernicious view.

Further, there is no danger that challenged minority-majority districts will cause racial segregation. As an empirical matter, citizens simply do not choose where to live based on congressional district lines. *See Shaw* v. *Hunt*, 861 F. Supp. 408

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[27] *See* Higginbotham *et al.*, *supra* note 1, at 1653-57 Apps. E & F (for racial composition of southern congressional districts).

(E.D.N.C. 1994). Thus, the Voting Rights Act and reapportionment more generally will not affect residential patterns. Minority-majority districts, in other words, do not exacerbate existing segregated residential patterns. Rather, these districts bring together African-American and white voters and do nothing more than recognize that, at the neighborhood level, Georgia, like many other states, is *already* separated and segregated, and Georgia voting patterns are already divided along racial lines.

B. The Representatives Elected From the Challenged Districts Faithfully Represent the Interests of All Their Constituents

The other danger this Court identified in *Shaw* was that representatives elected from "bizarre" minority-majority districts might ignore the needs of constituents who are not members of the racial majority within their districts. Given legislators' inevitable awareness of the racial composition of their districts, *see Shaw*, 113 S. Ct. at 2826, however, this danger obviously exists regardless of the shape of the district that elected them, the racial component of the majority, and the race of the elected representative. Surely this Court does not suppose that African-American representatives from minority-majority districts are inherently less likely than their white counterparts to represent all their constituents fairly.[22/]

In fact, members of the Caucus represent *all* the residents of their districts, whatever their race. Our doors are always open

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[22/] The implication that white representatives elected from white-majority districts can adequately and fairly represent the interests of their minority constituents, but that African Americans or other minorities cannot represent the interests of white constituents, is indefensible. In fact, this nation's experience has been to the contrary: for centuries many white legislators at all levels of government acted against the interests of their African-American constituents.

to all constituents.[29] We perform the traditional constituent service functions with the same vigor for white constituents as we do for African-American constituents. We also zealously represent the geographically defined interests of our districts—for instance, the needs of particular employers or industries.

Moreover, it would be illogical to conclude that the representatives elected from the Georgia's District Eleven or other minority-majority districts pursue only a "racial agenda." Congressional representatives have voting responsibility on a wide range of issues. While some of those issues, such as health care, crime control and welfare reform, are issues about which African Americans have strong concerns, solutions to these issues are not approached on the basis of race. Indeed, by all assessments, the African-American representatives of the 103rd Congress acted ably and fairly to represent the interests of all of their constituents. [30]

C. Minority-Majority Districts Do Not Increase Racial Polarization

Nothing in the record in this case or in any of the other cases that have followed *Shaw* has provided even the slightest empirical support for the proposition that race-conscious districting has increased the levels of racial-bloc voting within minority-majority districts. Indeed, our experience suggests the contrary with regard to the attitudes of white voters. Familiarity with black elected officials breeds content, not contempt: white voters are far *more* likely to vote for African-American incumbents than they are for African Americans seeking open seats.

The reasons, as the previous section of this brief suggests, are not hard to fathom. Our constituent service, our championship

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[29] Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 214 (E.D. Ark. 1989) (white state legislators in Arkansas sent black constituents from their own districts to seek assistance from African-American representatives elected from other districts), *aff'd*, 498 U.S. 1019 (1991) .

[30] *See* Bositis, *supra* note 26, at 29-30.

of the diverse interests of our districts' citizens, and our fidelity to the public interest show our white constituents that African-American elected officials will represent them fairly and diligently. Thus, virtually *all* of us have received increased support from the white community over time. If anything, then, our districts have decreased the levels of racial polarization or balkanization in American society.

CONCLUSION

This case raises fundamental issues concerning our representative democracy. To forge their view of American democracy, appellees conjure a utopia—a color-blind society—where an individual's race has little impact on his or her life, where the race of a candidate for political office does not influence citizens' voting behavior and where African Americans do not have shared political interests simply because of the color of their skin. This is our dream too. As the poet Langston Hughes eloquently wrote:

> I dream a world where all
> Will know sweet freedom's way
> Where greed no longer saps the soul
> Nor avarice blights our day
> A world I dream where black or white,
> Whatever race you be,
> Will share the bounties of the earth
> And every man is free.[31/]

The court below adhered to a similar vision, noting that "[b]lacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths." (*See* App. at 82) But the journey of African Americans on the path to equality is still in its nascent stage. The dream of equality cannot substitute for reality in interpreting the Constitution today, at a time when the United States has not yet attained this hopeful vision. The realities

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[31/] L. Hughes, "I Dream a World," in *American Negro Poetry* 71-72 (A. Bontemps ed., 1963).

are that race matters;[22] that voting is racially polarized; that the color of a candidate's skin does affect voting; that many African Americans do have shared political interests. In light of these realities, the necessity of minority-majority districting to render our democracy representative is compelling.

The *Johnson* Court abdicated its responsibility to ground its legal analysis in the racial realities of the Nation today. This Court should reject the conclusions of the court below, which are in conflict with the realities of racial bloc voting and African-American exclusion from the political process, as well as the rules laid down in *Shaw*.

Reality: from 1871 to 1973, no African American from Georgia served in the United States Congress. Georgia's post-1990 reapportionment represents the state's good-faith effort to remedy that tragic history of racial exclusion. Reality: for the first time in the state's history, Georgia has a truly integrated congressional delegation that fairly reflects the state's racial diversity. Reality: three African Americans now serve; each represents a racially integrated district.

This Court should not sanction efforts to turn the clock back towards the days of a lily-white legislature governing a diverse nation. This Court should emphatically reject the theory that a 60% African-American constituency—like the challenged Georgia Eleventh District—is segregated while a 95% white district—like another in Georgia—is not. Thus, this Court should reverse the judgment of the district court and hold that states have

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[22] *See* Cornel West, *Race Matters* 3 (1993):

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society—flaws rooted in historic inequalities and longstanding cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.

the power to ensure the equal opportunity of African-American citizens to participate in all levels of a pluralist political process.

Dated: February 21, 1995

Respectfully submitted,

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APPENDIX A

APPENDIX A:

AFRICAN-AMERICANS IN THE U.S. CONGRESS, 1870-1995

United States Senate

Member	Party-State	Years
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-

United States House of Representatives

Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75
		1877-79
John R. Lynch	R-MS	1873-77
		1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77
John A. Hyman	R-NC	1875-77
Charles E. Nash	R-LA	1875-77
Robert Smalls	R-SC	1975-79
James E. O'Hara	R-NC	1883-87
Henry P. Cheatham	R-NC	1889-93
John M. Langston	R-VA	1890-91

Member	Party-State	Years
Thomas E. Miller	R-SC	1890-91
George W. Murray	R-SC	1893-95 1896-97
George W. White	R-NC	1897-1901
Oscar DePriest	R-IL	1929-35
Arthur W. Mitchell	D-IL	1935-43
William L. Dawson	D-IL	1943-70
Adam C. Powell, Jr.	D-NY	1945-67 1969-71
Charles C. Diggs, Jr.	D-MI	1955-80
Robert N.C. Nix	D-PA	1958-78
Augustus F. Hawkins	D-CA	1963-90
John Conyers, Jr.	D-MI	1965-
William L. Clay	D-MO	1969-
Louis Stokes	D-OH	1969-
Shirley A. Chisholm	D-NY	1969-82
George W. Collins	D-IL	1970-72
Ronald V. Dellums	D-CA	1971-
Ralph H. Metcalfe	D-IL	1971-78
Parren H. Mitchell	D-MD	1971-86
Charles B. Rangel	D-NY	1971-
Walter E. Fauntroy	D-D.C.	1971-90
Yvonne B. Burke	D-CA	1973-79
Cardiss Collins	D-IL	1973-
Barbara C. Jordan	D-TX	1973-78
Andrew J. Young	D-GA	1973-77
Harold E. Ford	D-TN	1975-
Bennett M. Steward	D-IL	1979-80
Julian C. Dixon	D-CA	1979-
William H. Gray	D-PA	1979-91
Mickey Leland	D-TX	1979-89
Melvin Evans	R-V.I.	1979-80
George W. Crockett, Jr.	D-MI	1980-90
Mervyn M. Dymally	D-CA	1981-92

Member	Party-State	Years
Gus Savage	D-IL	1981-92
Harold Washington	D-IL	1981-83
Katie B. Hall	D-IN	1982-84
Major R. Owens	D-NY	1983-
Edolphus Towns	D-NY	1983-
Alan Wheat	D-MO	1983-94
Charles A. Hayes	D-IL	1983-92
Alton R. Waldon, Jr.	D-NY	1986-87
Mike Espy	D-MS	1987-93
Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-84
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-
Carrie Meek	D-FL	1993-
Mel Reynolds	D-IL	1993-
Bobby L. Rush	D-IL	1993-
Robert C. Scott	D-VA	1993-
Walter R. Tucker, III	D-CA	1993-

Member	Party-State	Years
Melvin Watt	D-NC	1993-
Albert R. Wynn	D-MD	1993-
Bennie G. Thompson	D-MS	1993-
Sheila Jackson Lee	D-TX	1995-
Chaka Fattah	D-PA	1995-
Victor O. Frazer	I-V.I.	1995-
J.C. Watts	R-OK	1995-

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No. 94-631, No. 94-797, No. 94-929

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On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN SUPPORT OF THE APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THIS COURT HAS RECOGNIZED THAT MULTIPLE STATE POLICIES, INCLUDING POLITICAL CONSIDERATIONS, ARE A LEGITIMATE PART OF REDISTRICTING	4
II. THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY TO ANY DISTRICT WHERE RACE IS A SUBSTANTIAL OR MOTIVATING CONSIDERATION IN THE CREATION OF THAT DISTRICT	8
A. *Shaw* Does Not Require Strict Scrutiny In All Instances When Race Is A Substantial Factor In The Drawing Of A District	9
B. Strict Scrutiny Is Not Applicable When An Irregularly Or Bizarrely Shaped District Is Explainable On Grounds Other Than, Or In Addition To, Race	14
C. The Challenged District Is Not Bizarre Or Irregular In Shape And, In Any Event, The Shape Of The Eleventh District Is Not Due Solely To Racial Considerations	16
III. IF THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY, THE GEORGIA CONGRESSIONAL REDISTRICTING PLAN STILL SATISFIES THIS HEIGHTENED ANALYSIS	18

TABLE OF CONTENTS—Continued

Page

A. Complying With The Voting Rights Act And Eradicating The Effects Of Historical Discrimination Provided Georgia With Compelling Interests To Create The Eleventh District 19

B. The Eleventh Congressional District Is Narrowly Tailored 20

C. The Approach To Narrow Tailoring Adopted By The Lower Court Is Unworkable 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: Page

Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws, 781 F. Supp. 394 (D.Md. 1991) (three judge court), *aff'd*, 112 S. Ct. 2269 (1992) 7

Arizonans for Fair Representation v. Symington, 828 F. Supp. 684 (D.Az. 1992), *aff'd sub nom. Arizona Hispanic Community Forum v. Symington*, 113 S. Ct. 454 (1992) 7

Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) 14, 15

Beer v. United States, 425 U.S. 130 (1976) 12

Burns v. Richardson, 384 U.S. 73 (1966) 6

Chapman v. Meier, 420 U.S. 1 (1975) 4

Davis v. Bandemer, 478 U.S. 109 (1986) 5, 15

DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) 14

DeWitt v. Wilson, 1994 WL 325414 (E.D. Cal. 1994), *appeal pending*, No. 94-275 9

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Good v. Austin, 800 F. Supp. 551 (E. & W.D. Mich. 1992) 14

Growe v. Emison, 113 S. Ct. 1075 (1993) 4, 13, 23

Hastert v. Illinois State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) 14

Hays v. Louisiana I, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded sub nom. Louisiana v. Hays*, 114 S. Ct. 2731 (1994), *further proceedings on remand, Hays v. Louisiana II*, 862 F. Supp. 119 (W.D. La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *prob. juris. noted*, No. 94-627 9

In re: Reapportionment of Colorado General Assembly, 828 P.2d 185 (Col. 1992) 15

TABLE OF AUTHORITIES—Continued

Page

Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) 13, 14
Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) ..... *passim*
Karcher v. Daggett, 462 U.S. 725 (1983) 7, 14, 15
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McDaniel v. Sanchez, 452 U.S. 130 (1978) 4
People ex rel. Burris v. Ryan, 588 N.E.2d 1023 (Il. 1991), *cert. denied*, 112 S. Ct. 2940 (1992) 15
Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three judge court), *aff'd*, 113 S. Ct. 30 (1992) .. 6
Prosser v. Elections Board, 793 F. Supp. 859 (W.D. Wis. 1992) (three judge court) 7, 14
Reynolds v. Sims, 377 U.S. 533 (1964) 7
Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (three judge court), *appeal pending*, No. 94-923 ..... 9, 19-20
Shaw v. Reno, 113 S. Ct. 2816 (1993) ..... *passim*
Thornburg v. Gingles, 478 U.S. 30 (1986) 12, 13, 20-23
United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144 (1977) 10, 11
Upham v. Seamon, 456 U.S. 37 (1982) 4
Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *appeals pending*, Nos. 94-805, 94-806 9
Voinovich v. Quilter, 113 S. Ct. 1149 (1993) 13, 14, 20
Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992) 7, 14
Wilson v. Eu, 823 P.2d 545 (Cal. 1992) 14
White v. Weiser, 412 U.S. 783 (1973) 6
Wise v. Lipscomb, 437 U.S. 535 (1978) 4
Wood v. Broom, 257 U.S. 1 (1932) 15

Constitution, Acts and Statutes:

United States Constitution, Fourteenth Amendment 4, 11
United States Constitution, Fifteenth Amendment .. 11
United States Constitution, Article I, Section 2 .... 4, 7

TABLE OF AUTHORITIES—Continued

	Page
The Apportionment Act of 1911, 37 Stat. 13 (1911)	15
The Apportionment Act of 1929, 46 Stat. 21 (1929)	15
Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, as amended (1982)	3, 4, 13, 19, 20
Voting Rights Act, § 2, 42 U.S.C. § 1973	12-14, 20-24
Voting Rights Act, § 4(b), 42 U.S.C. § 1973(b)	12
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BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN SUPPORT OF THE APPELLANTS

INTEREST OF AMICI

The Democratic National Committee (DNC) is the national political organization of the Democratic Party.

The Democratic Congressional Campaign Committee (DCCC) is the political organization for Democratic Members of the House of Representatives and is responsible for assisting Democratic candidates running for election to the House.

The DNC and DCCC both have an interest in the issues presented in this case, specifically, the redistricting process and the laws governing the configuration of congressional districts. So too, the *amici* have an interest in ensuring that all citizens have an equal opportunity to participate in the political process, and that laws enacted to further that goal are vigorously implemented.

Pursuant to Rule 37 of the Rules of this Court, written consent of all of the parties for the filing of this brief has been lodged with the Clerk.

STATEMENT OF THE CASE

In the interest of brevity, the *amici* adopt the statement of the case set forth in the brief of the Abrams appellants.

SUMMARY OF ARGUMENT

1. When drawing a redistricting plan, a legislature must comply with applicable law, but beyond that is free to pursue a variety of state interests and policies, oftentimes including political or partisan goals. This Court has on numerous occasions recognized the legitimacy of these state redistricting policies, including political considerations. As a result, the particular configuration of a redistricting plan cannot be fully understood without an appreciation for the many state interests and policies that are reconciled by the legislature during the redistricting process.

2. In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the Court held that a plan was subject to strict scrutiny if a bizarrely or irregularly shaped district was explainable solely on grounds of race. The court below erred by expanding

this rule to apply strict scrutiny to any district, regardless of its shape, in which race was a substantial or motivating factor. Because of legal requirements, including compliance with the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, race is a "substantial" factor in the creation of many districts. The lower court's rule will result in a strict scrutiny review of virtually every majority minority district in the country, a result not required by or contemplated by *Shaw*.

In addition, however, the lower court erroneously assumed that the configuration of the district under review was caused solely by race. The lower court failed to appreciate that personal, political, partisan, historical and geographic factors also, and in some instances, primarily, contribute to the irregular shape of many race-based districts. In such cases, the bizarre shape of the district is not "solely," or often, even primarily, explainable by race. Under *Shaw*, strict scrutiny should not apply to such race-based districts, even if they are irregular in shape.

3. Even if strict scrutiny is applicable to the district under review, the lower court erred in rejecting remediation of historical discrimination as a compelling state interest. Further, the court improperly concluded that § 2 of the Voting Rights Act did not justify the creation of a minority district in south-central Georgia. The lower court improperly rejected extensive evidence in the record demonstrating the existence of racially polarized voting. And it set an unrealistic standard for narrow tailoring, in holding that the minority composition of the challenged district is too high. Social scientists have only an inexact ability to identify the precise point at which the percentage of minority voters will satisfy the § 2 requirement to provide such voters with an equal opportunity to elect candidates of their choice. The lower court's conclusion that the Georgia plan over-concentrates minority voters fails to give appropriate latitude to legislative decisions which are necessarily based on imprecise estimates.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT MULTIPLE STATE POLICIES, INCLUDING POLITICAL CONSIDERATIONS, ARE A LEGITIMATE PART OF REDISTRICTING

This Court has repeatedly held that the power of a state to redraw state legislative and congressional districts is a fundamental right reserved to the states. *Wise v. Lipscomb,* 437 U.S. 535, 539 (1978). "Redistricting and reapportioning legislative bodies is a legislative task, which the federal court should make every effort not to preempt." *Id.* at 539. In *Chapman v. Meier,* 420 U.S. 1 (1975), this Court noted "[w]e say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court." *Id.* at 27. *See also Growe v. Emison,* 113 S.Ct. 1075, 1081 (1993) ("[T]oday we renew our adherence to the principles expressed in [*Scott v.*] *Germano,* which derive from the recognition that the Constitution leaves with the States primary responsibility for the apportionment of their federal congressional and state legislative districts").

It is also well established that a legislatively enacted redistricting plan must be accorded substantial deference. A federal court should not substitute its own reapportionment plan and policy choices for those of the state, acting through its elected officials. *Upham v. Seamon,* 456 U.S. 37, 40 (1982); *McDaniel v. Sanchez,* 452 U.S. 130 (1978).

So too, the Court has recognized a wide variety of state interests and state policies which the legislature may legitimately consider in crafting a redistricting plan. In drawing a congressional plan, a state must of course comply with the requirements of Article I, Section 2 and the Fourteenth Amendment to the United States Constitution, as well as the Voting Rights Act, 42 U.S.C.

§ 1973 *et seq.*, as amended (1982). But beyond these legal minima, there are a range of permissible policy choices that reflect the complicated and often idiosyncratic interplay of political, partisan, personal, historical and geographic considerations that inevitably are part of the redistricting process. The Court has not only recognized the fact of these considerations, but has also held them to play a legitimate role in the process. In understanding any redistricting plan, including a plan that contains race-based districts, it is vital to understand the role often played by these legitimate—and wholly non-racial—factors.

First and foremost, political considerations are always a factor in redistricting. This Court has acknowledged as much:

> Politics and political considerations are inseparable from districting and apportionment. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). In *Gaffney*, the Court upheld a redistricting plan that "attempted to reflect the relative strength of the [political] parties in locating and defining election districts." *Id.* at 752.

In addition to partisan proportionality, there is often an inherent dynamic to use the redistricting process for political advantage. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court acknowledged this aspect of redistricting:

> [W]e think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . .
>
> As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.

478 U.S. at 128-29.

The Court held that a legislature's political motives in redistricting would not be unconstitutional unless its plan works to the long term and systematic disadvantage of an identifiable political group. *Id.* at 133. But short of that extreme case, the courts are to give free rein to the frankly political dynamics of this most political of all legislative activity. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992) (three judge court), *aff'd*, 113 S.Ct. 30 (1992). Such politics can usually explain a good deal about a redistricting plan, from the overall partisan composition of the delegation down to the particular configuration of individual district lines.

A subset of political concern in redistricting is the protection of incumbents. Again, the Court has held this to be a legitimate legislative goal, one that works to preserve the seniority of a state's congressional delegation, with the attendant benefits that such seniority brings, and to maintain the relationship between an elected official and his or her constituents. In *White v. Weiser*, 412 U.S. 783 (1973), the Court noted that it "d[id] not disparage" a state policy "frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved" in Congress. *Id.* at 791; *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16

(1966) (drawing district boundaries to minimize the number of contests between incumbents does not establish invidiousness). So too, in *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that "preserving the cores of prior districts, and avoiding contests between incumbent Representatives," both to be legitimate legislative policies that, if consistently applied, would justify deviation even from the strict standard of absolute population equality that is imposed on congressional plans by Article I, Section 2.[1]

The Court in *Karcher* also recognized the legitimacy of other traditional state redistricting goals: drawing compact districts and respecting municipal boundaries. This recognition was affirmed in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), where the Court noted that district lines may properly be drawn "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." 113 S. Ct. at 2826; *see also Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Lower courts have recognized as well the related goal of avoiding the splitting of election precincts or wards. *E.g.*, *Prosser v. Elections Board*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (three judge court).

All these factors, particularly the political ones, are relevant to explaining any congressional redistricting map.

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[1] *See also Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394, 397 (D.Md. 1991) (three judge court), *aff'd*, 112 S. Ct. 2269 (1992) ("recognizing incumbent representatives with its attendant seniority, in the House of Representatives" held legitimate); *Wesch v. Hunt*, 785 F. Supp. 1491, 1499 (S.D. Ala. 1992) (three judge court), *aff'd sub nom. Camp v. Wesch*, 112 S.Ct. 1926 (1992) (modifying a court-drawn plan so that two congressmen will not be in the same district); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (D.Az. 1992) (three judge court), *aff'd sub nom. Arizona Hispanic Community Forum v. Symington*, 113 S. Ct. 454 (1992) (court-drawn plan avoided the "outdistricting of incumbents" to enable the voting population of a district to maintain its relationship with its particular representative).

In understanding the configuration of any district—whether race-based or not—full measure must be given to the interplay of political and partisan factors along with other state redistricting criteria. The assessment becomes even more difficult in a race-based district because the requirements of the Voting Rights Act are imposed upon —but certainly do not replace—these political calculations and other legitimate state policy choices. Although it is possible that the shape of a district could be explained by race, and race alone, it would be the rare case when political and partisan concerns did not substantially affect the shape as well.

II. THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY TO ANY DISTRICT WHERE RACE IS A SUBSTANTIAL OR MOTIVATING CONSIDERATION IN THE CREATION OF THAT DISTRICT

The majority opinion below in *Johnson v. Miller*[2] misapplied the holding of this Court in *Shaw v. Reno*, and improperly invoked strict scrutiny. According to the district court majority:

> The proper interpretation of *Shaw v. Reno*'s "race-based" requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district.

J.S. App. at 36. (Emphasis in original.)[3]

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[2] The decision is reported at 864 F. Supp. 1354 (S.D. Ga. 1994).

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Abrams Appellants.

This approach is similar, although not identical, to the approach adopted by other lower courts addressing *Shaw* claims. *See Shaw*

The lower court determined that race was the "overriding, predominant force" determining the shape of the Eleventh Congressional District and held that since the State of Georgia failed to establish a compelling state interest, the districting plan "fails strict scrutiny under the Fourteenth Amendment." J.S. App. at 89. By focusing solely on racial motivation, the lower court failed to appreciate that a *Shaw* claim arises only when racial motivation is directly and solely responsible for a bizarrely shaped district. In giving insufficient weight to the relationship of race and bizarre configuration, the lower court's approach expands the application of strict scrutiny in redistricting cases far beyond the bounds set forth in *Shaw*.

A. *Shaw* Does Not Require Strict Scrutiny In All Instances When Race Is A Substantial Factor In The Drawing Of A District

Under *Shaw*, race consciousness alone does not trigger strict scrutiny. It is only when race-based districting results in a bizarrely shaped district, and indeed, is the sole explanation for the bizarre shape, that strict scrutiny is triggered.

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v. Hunt, 861 F. Supp. 408, 431 (E.D.N.C. 1994) (three judge court), *appeal pending*, No. 94-923 (strict scrutiny is triggered "by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority"); *Hays v. Louisiana I*, 839 F. Supp. 1188, 1194 (W.D.La. 1993), *vacated and remanded sub nom. Louisiana v. Hays*, 114 S. Ct. 2731 (1994), *further proceedings on remand, Hays v. Louisiana II*, 862 F. Supp. 119 (W.D.La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *prob. juris. noted*, Nos. 94-627; (applying strict scrutiny when a "legislature . . . *intentionally* draws one or more districts along racial lines"); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *appeals pending*, Nos. 94-805, 84-806 (strict scrutiny applies if there was an intent to create a majority minority district, even if a bizarre or irregular shape is due to non-racial factors); *But c.f. DeWitt v. Wilson*, 1994 WL 325414 (E.D. Cal. 1994), *appeal pending*, No. 94-275 (race consciousness alone does not trigger strict scrutiny unless "extremely irregular district boundaries" are drawn solely on the basis of race).

In *Shaw*, this Court held that "redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race . . . demands the same close scrutiny that we give other state laws that classify citizens by race." 113 S. Ct. at 2825. *Shaw* does not require strict scrutiny whenever race is a substantial or motivating factor in the drawing of a district: "We express no view as to whether the intentional creation of majority-minority districts without more always give rise to an equal protection claim." *Id.* at 2828. As recognized by Judge Edmondson in his dissenting opinion in *Johnson*, "Highly irregular shape—the appearance of the district—is the critical element of this new cause of action under the Equal Protection Clause." J. S. App. at 94.

The lower court majority erred in placing no weight on the appearance of the district in concluding that strict scrutiny applied. According to Judge Edmondson, "[t]he district's shape is no mere piece of evidence; it is a critical part of the cause of action." J. S. App. at 96-97.

> No fewer than six times the *Shaw* Court repeats that a district may be challenged on the grounds that it is "bizarre," "highly irregular" or "irrational on its face". . . . That the Court presented the issue in this manner cannot be ignored. To hold that the proper inquiry is simply whether race was a "substantial factor" ignores the plain language of the opinion.

J. S. App. at 96 n.3 (citations omitted).

The importance of district shape in a *Shaw* claim is evident from the *Shaw* Court's discussion of *United Jewish Organizations of Williamsburg v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). The *Shaw* decision did not disturb this Court's previous ruling in *UJO* in which a majority of the Court concluded that the conscious use of race in the design of majority minority legislative districts is not

per se unconstitutional.[4] The race classification claim recognized in *Shaw* was distinguished from *UJO* because:

> the plaintiffs in *UJO* . . . did not allege that the plan, on its face, was so highly irregular that it could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim.

Shaw, *supra* at 2829 (emphasis added). The *Shaw* majority also acknowledged that three Justices in *UJO* approved New York's use of race, in part, because it adhered to traditional districting principles:

> We think it also permissible for a State, *employing sound redistricting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose *residential patterns afford the opportunity* of creating districts in which they will be in the majority.

Id. (*quoting UJO*, 430 U.S. at 168).

Thus, a plain reading of *Shaw* and *UJO* indicates that it is not the use of race in the districting process *per se* which triggers strict scrutiny, but the existence of an irregularly or bizarrely shaped district drawn solely on the basis of race. "[W]e believe that reapportionment is one area in which appearances do matter." 113 S. Ct. at 2827. The key element of a *Shaw* claim is that a "districting plan be 'so bizarre on its face' . . . or 'irrational on its face' . . . or 'extremely irregular on its face,' . . . that it 'rationally cannot be understood as anything other than

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[4] Although only a plurality of this Court determined that "neither the Fourteenth nor Fifteenth Amendment mandates a *per se* rule against using racial factors in districting and apportionment," *UJO*, 430 U.S. at 161, two other Justices rejected the argument that "racial awareness in legislative reapportionment is unconstitutional *per se*." *Id.* at 179 (Stewart, J., joined by Powell, J., concurring).

an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.' " *Id.* at 2848 (Souter, J. dissenting).

That district shape in conjunction with the use of race, and not the use of race alone, is the linchpin of a *Shaw* claim is supported by this Court's interpretation of the Voting Rights Act. The Act requires a jurisdiction to be cognizant of race when redrawing political boundaries. Under § 5, 42 U.S.C. § 1973(c), covered jurisdictions [5] must be race conscious to determine if retrogression of minority voting strength has occurred.

In *Beer v. United States*, 425 U.S. 130 (1976), this Court held that to obtain preclearance a jurisdiction must establish that a voting change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. This requires a "covered" jurisdiction to analyze the effect of a newly drawn plan on minority voters. For example, in *Beer*, a redistricting plan for the New Orleans City Council was precleared since it increased the number of majority African American districts. *Id.* at 142.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, also requires that a jurisdiction pay careful and conscious attention to race. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court held that plaintiffs must establish three necessary preconditions to prove that "multimember districts operate to impair minority voters' ability to elect representatives of their choice." *Id.* at 50. These three preconditions are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically

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[5] Jurisdictions wholly covered under § 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b, as amended, include Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia and several counties or towns in California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota. 28 C.F.R. § 51.67 (1987).

> compact to constitute a majority in a single-member district . . .
>
> Second, the minority group must be able to show that it is politically cohesive . . .
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51.

This Court subsequently held that the *Gingles* preconditions also apply to challenges to single member districts. *Growe, supra* at 1084. Under *Gingles,* therefore, any jurisdiction with a sufficiently large and cohesive minority population and a pattern of legally significant white bloc voting must engage in race conscious redistricting in order to avoid committing a violation of § 2.

Moreover, this Court has previously recognized and upheld the use of race in the redistricting process. In *Voinovich v. Quilter,* 113 S. Ct. 1149 (1993), the Court upheld Ohio's race conscious legislative redistricting and rejected a lower court's holding "that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." *Id.* at 1156. Similarly, in *Johnson v. DeGrandy,* 114 S. Ct. 2647 (1994), Florida's deliberate creation of a proportionate number of majority minority districts within Dade County helped defeat a claim that the redistricting plan diluted minority voting strength.

Since compliance with the Voting Rights Act is such a critical consideration in redistricting—following only the constitutional requirement of population equality in importance—race will always be at least a substantial or motivating factor in the drawing of legislative districts in any jurisdiction with significant concentrations of mi-

nority population.[6] Thus, the standard adopted by the court below, although claiming to be a middle ground approach, J.S. App. at 36, would subject nearly every redistricting plan, regardless of the shape of the districts, to a strict scrutiny analysis.

B. Strict Scrutiny Is Not Applicable When An Irregularly Or Bizarrely Shaped District Is Explainable On Grounds Other Than, Or In Addition To, Race

Just as the use of race alone is not sufficient to trigger strict scrutiny, so too the bizarre shape of a district in and of itself does not trigger strict scrutiny. It is only when race is the sole explanation for a bizarrely or irregularly shaped district that strict scrutiny is properly applied.

As this Court has recognized, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for . . . districts." *Gaffney*, 412 U.S. at 752 n.18; *Badham v. Eu*, 694 F. Supp.

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[6] It is evident that virtually every state utilized racial factors when drawing legislative and congressional districts following the 1990 census. *See Johnson v. DeGrandy, supra*; *Voinovich, supra*; *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992); *Fonfara v. Reapportionment Commission*, 610 A.2d 153 (Conn. 1992); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D.Md. 1994). In addition, federal courts, when confronted with the responsibility of adopting redistricting plans, have also relied upon racial criteria. In *Good v. Austin*, 800 F. Supp. 551 (E. & W.D. Mich. 1992), the court set forth criteria to adopt a congressional redistricting plan:

> Any plan that is adopted must satisfy three different levels of criteria. The first and foremost criterion is the constitutional requirement of precise mathematical equality of population, to the extent mathematically possible, in each district. *Karcher v. Daggett*, 462 U.S. 725, 732 . . . Second, the plan must comply with the requirements of Section 2 of the Voting Rights Act . . . Finally, the plan must balance a wide array of secondary or equitable criteria.

Id. at 554. *See also DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1083-1084 (N.D. Fla. 1992); *Hastert v. Illinois State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Prosser v. Elections Board, supra*; *Wesch v. Hunt, supra.*

664, 671 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989). Nothing in the Constitution or any federal statute requires that congressional districts be compact.[7] Indeed, a visual review of the map of many states would reveal bizarrely shaped and highly irregular districts. *E.g., Bandemer,* 478 U.S. at 116, 138 (recognizing "the irregular shape of some district lines"); *Karcher,* 462 U.S. at 762 (Stevens J., concurring) (describing the congressional district configurations as "bizarre" and "uncouth"); *Badham,* 694 F. Supp. at 671 (noting the "bizarre and irregular shapes of districts"). The irregular shape of these districts can be explained by a multitude of factors, some geographic, some political, and some historical.

Likewise, the irregular shape of a race-based district alone does not trigger strict scrutiny. To be sure, some race-based districts are irregularly shaped, as are some white districts. But the bizarre shape of many of these districts can be explained not by race, but by the myriad of other legitimate factors or policies that a state pursues. For instance, it is often the case in drawing a minority district that a relatively compact minority district

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[7] This was not always the case. The Apportionment Act of 1911, 37 Stat. 13 (1911), provided:

> That in each state entitled under this apportionment to more than one Representative, the Representative . . . shall be elected from districts composed of a contiguous and compact territory. . .

In the Apportionment Act of 1929, 46 Stat. 21 (1929), Congress omitted any requirement that congressional districts consist of contiguous and compact territory. *See Wood v. Broom,* 257 U.S. 1, 7 (1932) (by omitting the compactness requirement, it was "manifestly the intention of Congress" to remove such requirements).

By contrast, some state constitutions and statutes impose a compactness requirement on state legislative redistricting. *In re: Reapportionment of Colorado General Assembly,* 828 P.2d 185 (Col. 1992); *People ex rel. Burris v. Ryan,* 588 N.E.2d 1023 (Ill. 1991), *cert. denied,* 112 S. Ct. 2940 (1992). *See also* National Conference of State Legislatures, Redistricting Provisions: 50 State Profiles (1989) (listing state by state redistricting requirements).

can be created. But such a district might result in political consequences unacceptable to the legislature, or disrupt incumbents in the area and thereby threaten the seniority of the state's congressional delegation. In such cases, the legislature might depart from creating the most compact minority district possible for reasons that have nothing to do with race, but have everything to do with partisan, political or other nonracial factors.

In such a case, the fact that a minority district is bizarrely shaped is not caused by, or explained by, race. Thus, in such a case the conjunction of facts that properly trigger a *Shaw* claim—the intentional creation of a minority district that, because of race, results in a highly irregular district—is not present. Only when race is the sole explanation for a bizarrely shaped or highly irregular district should strict scrutiny be utilized.

C. The Challenged District Is Not Bizarre Or Irregular In Shape And, In Any Event, The Shape Of The Eleventh District Is Not Due Solely To Racial Considerations

The Eleventh Congressional District is not so bizarre or irregular in shape as to raise concerns that the district "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw, supra* at 2828. Dr. Lisa Handley, an expert witness for the state, submitted a report which concluded that the Eleventh District is reasonably compact and regular. State D. Ex. 177 at 2. According to Dr. Handley: "The vast majority of the district's boundary lines follow pre-existing state, county and municipal boundaries." Specifically, Dr. Handley found that 71.1% of the Eleventh District's boundaries follow such boundaries. *Id.* at 3. In addition, "the great bulk of the . . . district is made up, physically and geographically, of intact county areas." *Id.* at 4. For example, eighty-seven percent of the Eleventh's areas is contained wholly within intact

counties." *Id.* These figures place the Eleventh District near the average for Georgia's other congressional districts. *Id.* at 3-4.[8]

Even if this Court determines that the Eleventh District is bizarre or irregular in shape, strict scrutiny should not have been employed. The shape of the Eleventh Congressional District was determined not solely on the basis of race, but instead reflects other considerations as well. Trial testimony established that numerous non-racial factors influenced the final design of the District.

Areas were included and removed from the Eleventh District for purely political or personal reasons. T. Vol.

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[8] Additional comparisons between the Eleventh District and Georgia's other congressional districts also indicate that the Eleventh District is not so unusual in shape. According to Judge Edmondson:

> 1. The size of the district is not particularly noteworthy. Georgia's Districts One, Two and Eight each have a total area of 10,100 square miles. In contrast, the Eleventh District has an area of 6,780 square miles.
>
> 2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1,243 miles) or the Eighth (1,155 miles) Districts.
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> 3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire State. But, the Ninth District spans the entire northern border of the State and the First, Second and Eighth Districts begin at the Florida border and stretch north to almost the middle of the state.
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> 6. Georgia's congressional districts have no tradition of being neat, geometric shapes. And, areas of the Second and Eighth Districts . . . look—as irregular or—much more irregular. The same may be said of the Third District . . . To be sure, the Eleventh makes curious turns in some areas . . . But, in these areas most of the lines follow existing city boundaries or major highways and roads. A comparison of . . . Georgia's Eleventh District to the district in *Shaw* or to districts being successfully challenged in other states supports the conclusion that the Eleventh District is not highly irregular or, put differently, bizarre.

J.S. App. at 97-99.

IV, 172-178; T. Vol. I, 107-109; T. Vol. III, 265. For example, the chair of the senate reapportionment committee requested that a majority white precinct in which his son lived be included in the district. T. Vol. II, 87, 202. In addition, Butts and Henry Counties were included in the district to get the votes of certain legislators, T. Vol. II, 206-09, and only a small slice of Effingham County is included in the district because a white representative wished to keep as much of the county out of the Eleventh as possible. J.S. App. at 44 n.25. Some of the irregular shape was also due to adherence to political and precinct boundaries. T. Vol. II, 197-200, 207-209, 224. Finally, the decision of the legislature to include certain geographic areas in other districts affected the final design of the Eleventh District. T. Vol. II, 93.

Although it is evident that Georgia drew the Eleventh District with the intent of creating a majority minority district, a multitude of non-racial factors also influenced the final shape of the district, and contributed to the irregularity of its shape. These factors reflected legitimate state interests, to which the courts should accord deference. The district court erred in not providing this deference to Georgia's policy choices, and in subjecting the challenged district to strict scrutiny instead.

III. IF THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY, THE GEORGIA CONGRESSIONAL REDISTRICTING PLAN STILL SATISFIES THIS HEIGHTENED ANALYSIS

Even if strict scrutiny should be applied to the Eleventh Congressional District, the lower court erred in holding the District was not narrowly tailored to further a compelling state interest.

A. Complying With The Voting Rights Act And Eradicating The Effects Of Historical Discrimination Provided Georgia With Compelling Interests To Create The Eleventh District

At trial, appellants offered several compelling justifications for the Eleventh District: complying with the Voting Rights Act, eradicating the effects of past or present racial discrimination, and achieving proportional representation. J.S. App. at 52-53. The district court erroneously concluded that none of these justifications was sufficiently compelling. J.S. App. at 89.

In *Shaw*, this Court recognized that complying with the Voting Rights Act and eradicating the effects of past racial discrimination may serve as compelling state interests. 113 S. Ct. at 2830-2832. According to the Court, "States certainly have a very strong interest in complying with federal anti-discrimination laws that are constitutionally valid as interpreted and applied." *Id.* at 2830. Similarly, the Court noted that "[w]e previously have recognized a significant state interest in eradicating the effects of past racial discrimination . . ." *Id.* at 2831-2832.

However, in contrast to this Court's decision in *Shaw*, the *Johnson* court "conclude(d) that a compelling state interest in remedying prior discriminatory voting practices does not exist independent of the Voting Rights Act." J.S. App. at 56. In reaching this conclusion, the *Johnson* court incorrectly assumed that unless minority voters can satisfy the requirements of the Voting Rights Act, a State does not have "a strong basis in evidence for concluding that remedial action is necessary." J.S. App. at 57.

The *Johnson* court failed to recognize that a jurisdiction may have a continuing history of racial discrimination in its voting practices, yet minority voters may be

unable to establish a violation of the Voting Rights Act.[9] As the district court in *Shaw v. Hunt* reasoned:

> [T]here may be cases in which a state will have a compelling state interest in engaging in race-based redistricting to remedy identified instances of discrimination in its own political processes, even when it has no firm basis for concluding that § 2 requires it to do so: for example, when it has a history of official racial discrimination in its electoral system, which has resulted in the virtual exclusion of members of a particular racial minority from participation in its political processes, but it knows that the creation of majority-minority districts is not required by the "effects" prong of § 5, because it has never had such districts before, and that the relevant minority group cannot show that § 2 requires the creation of any majority-minority districts . . .

861 F. Supp. at 444.

Thus, the district court was wrong in concluding that the Voting Rights Act provides the sole basis to justify a minority district. *Shaw* recognized an independent justification in remediating historic discrimination, which the court below failed to consider.

B. The Eleventh Congressional District Is Narrowly Tailored

Since the lower court concluded that only § 2 of the Voting Rights Act provided a compelling state interest, its inquiry into narrow tailoring was limited to determining whether the Eleventh District was required under § 2.

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[9] For example, a jurisdiction may dilute minority voting strength by intentionally fragmenting a cohesive, geographically compact minority population over a period of several decades, even though the group is insufficient in numbers to comprise a majority in a single member district as required in *Gingles*. *See Garza v. Los Angeles County Board of Supervisors*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). In addition, this Court has expressly declined to rule on whether a minority group unable to comprise a majority in a single member district can nonetheless establish a § 2 violation. *Voinovich v. Quilter, supra.*

But according to the lower court, "[t]he record fails to demonstrate compactness, chronic bloc voting or reasonably necessary black voting percentages in the Eleventh Congressional District." J.S. App. at 88. Therefore, the court held that the *Gingles* preconditions could not be established and the Eleventh District was "not narrowly tailored to comply with the putatively compelling interest of section 2 compliance." J.S. App. at 89.

In reaching this conclusion, the lower court ignored the weight of the evidence. With respect to the first *Gingles* factor, African American voters are sufficiently large in number and geographically compact to comprise a majority in a congressional district in south-central Georgia. As discussed above, *see supra* pp. 16-18, evidence in the record supports a conclusion that the Eleventh District is reasonably compact.

Although it is possible that the Eleventh District could have been drawn to be more geographically compact, there is no legal requirement, under § 2 or elsewhere, that a jurisdiction adopt the *most* geographically compact minority district possible. Since this Court has never even adopted a definition for geographic compactness, such a rule would require a jurisdiction to guess about how to draw its lines. Indeed, not only is there no legal standard of compactness, there is no uniform definition of compactness in the social science community, nor consensus among social scientists as to the meaning, relevance or measurement of compactness.[10] Nevertheless, a district

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[10] Even social scientists who contend that compactness should be a consideration in redistricting recognize that compactness can be conceptualized in many different ways. It can be defined in purely spatial terms (either with respect to its spread over a large geographical area or the convolutions of its borders), in terms of the distribution of the population within the district, or in terms of the district's conformity to natural boundaries, political subdivisions, transportation routes, precinct lines, etc. C.F. Niemi, Grofman, Carlucci, Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerry-*

that is made up of intact county areas and which follows existing boundaries to as great an extent as the Eleventh District, cannot be considered non-compact.

As to the second and third prongs of the *Gingles* test, the court also erred in dismissing the convincing evidence of racially polarized voting. Dr. Allan Lichtman, an expert for the United States Department of Justice, conducted both a bivariate ecological regression analysis and a homogeneous precinct or extreme case analysis of the state.[11] Dr. Lichtman found a high level of political cohesion among African American voters and a strong pattern of racially polarized voting state-wide, as well as in the particular counties included within the Eleventh District. DOJ Ex. 24 at 7-9. For example, in the 1992 Democratic Primary runoff in the Eleventh District, between a white and an African American candidate, the African American candidate received only 23% of the white vote. *Id.* at 18. As a result of the polarized voting, preferred candidates of African Americans have been regularly defeated throughout the State.[12]

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mandering, 52 J.Pol. 1155 (1990). Beyond conceptual problems, some academics contend that an accurate measure of compactness is unattainable and therefore that compactness "should be either abandoned as a standard altogether, or left in the domain of the dictionary definition. . . ." Young, *Measuring the Compactness of Legislative Districts*, XIII Legis. Stud. Q. 105, 114 (1988). Finally, some authorities have argued that "the historical reason for compact districts—to lessen transportation and other costs—is less applicable today," and thus that the concept is of dubious relevance as a redistricting criterion. B. Cain, The Reapportionment Puzzle, p.33 (1984).

[11] These are the two standard methodologies accepted by this Court in *Thornburg v. Gingles*, *supra* and regularly employed by experts in vote dilution litigation. *See* B. Grofman, L. Handley, R. Niemi, Minority Representation and the Quest for Voting Equality, (1992).

[12] Dr. Joseph Katz, an expert for the State, attempted to criticize Dr. Lichtman's ecological regression analysis, however his criticism did not take into account Dr. Lichtman's homogeneous precinct

Based on this evidence, minority voters can satisfy the *Gingles* preconditions in south central Georgia. Therefore, Georgia had a compelling interest in drawing the Eleventh District in order to avoid a § 2 violation.

Finally, the court erred in determining that "the 60.36% black voting age population of the Eleventh [district] is excessive." J.S. App. at 84. The court reasoned that since the Eleventh District "had a black *registered* voter percentage of 57% . . . the probability afforded by the current Eleventh District represents more than an 'equal' opportunity and is in excess of that required by § 2 of the Voting Rights Act." J.S. App. 88. The court also noted that the "Second and Fifth Districts have 52.33% and 57.47% black voting age population, respectively, . . . [and] were sufficiently majority black to satisfy the DOJ and, so presumably the VRA." J.S. App. 84.

The court's holding is inconsistent with this Court's decision in *Gingles* and the findings of Dr. Lichtman. In *Gingles,* this Court held that § 2 requires *district specific* analysis. *Gingles,* 478 U.S. at 55-58. *See also Growe, supra.* Therefore, the lower court's reliance on minority percentages in other districts located in other areas of the state says little about the adequacy of the minority percentage of the Eleventh District.

Further, the district court was incorrect in concluding that the minority percentage of the Eleventh District was well in excess of the amount necessary to provide equal

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analysis and did not apply to Dr. Lichtman's principal analysis of elections conducted within the precincts of the current Eleventh District. Rather, on cross-examination, Dr. Katz admitted that his criticisms applied only to the small sample single county elections included as appendices to Dr. Lichtman's report. T.Vol. V, 76-80. Dr. Katz's own analysis of elections still demonstrates racially polarized voting. According to Dr. Katz's own best estimates, about 80% of Black voters voted for Black candidates, whereas only about 28% of white voters voted for Black candidates. State D. Ex. 170 at 21.

voting opportunities to minority voters. According to Dr. Lichtman:

> The results of the 1992 Democratic primary and runoff for Congress show that District 11 is not a "safe" district for congressional candidates of choice of black voters. Rather, the district is competitive for candidates of choice of both the black and white electorate. The 1992 Democratic primary election produced no clear winner, as black candidate McKinney led white candidate DeLoach by 31% to 25%. The runoff election between DeLoach and McKinney was a competitive one, with McKinney garnering 56% of the vote.

DOJ Ex. 24 at 20.

Dr. Lichtman's analysis revealed that, due to differential turnout rates between white and African American voters, only approximately 50% of the voters who actually cast ballots on election day will be African American. *Id.* at 24.[13] Since African Americans will comprise only half of the election day turnout in the Eleventh District, this district is, by definition, not overly safe. Accordingly, the record does not support the lower court's conclusion that the Eleventh District is not narrowly tailored.

C. The Approach To Narrow Tailoring Adopted By The Lower Court Is Unworkable

An additional problem with the lower court's analysis is that it assumes an exactness to the predictability of future election outcomes which is illusory. The lower court, under the guise of narrow tailoring, appears to impose a requirement that any majority minority district contain just the exact percentage of minority voters necessary to satisfy § 2 requirements—and no more. But this precise percentage is not readily ascertainable. Although social scientists have developed a number of techniques to

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[13] The expert for the plaintiffs, Dr. Ron Weber, found similar levels of turnout. P. Ex. 82 at 17.

predict the future viability of minority districts, it is an inexact science involving variables that cannot be controlled.

A district population, in numbers, racial/ethnic composition and turnout of minority and white voters, is constantly changing and cannot be determined with any precision. Election results also turn on future political conditions, as well as quality of candidates, funding and political organizations. In addition, a lack of prior black vs. white congressional elections within the boundaries of a newly formed congressional district requires that an analysis be indirect, and based on non-congressional elections.[14]

Finally, it is politicians, not statisticians or social scientists, who draw districts. The final shape and composition of districts reflect the give and take of the political process. Redistricting generally occurs under extreme time pressures, with little opportunity to conduct the requisite analysis apparently deemed necessary by the lower court.

For all these reasons, states must be given some latitude in drawing minority districts. The state must be free to ensure that the minority population in a majority minority district is sufficiently high to achieve the compelling state interest sought by the state—compliance with § 2 of the Voting Rights Act. In light of all of the uncertainties about predicting just where this critical target is, the state must have some reasonable flexibility to aim a little high, in order to ensure that it not hit a point that in practice turns out to be too low. Accordingly, so long as the minority percentage in a district is not unreasonably high, it should not be held to violate the narrow tailoring standard. The imposition of the approach proposed by the district court would place a nearly impossible requirement on legislative bodies.

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[14] All the experts in *Johnson* relied on exogenous elections for their conclusions on the level of racially polarized voting.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court.

Respectfully submitted,

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ZELL MILLER, et al., *Appellants,*

v.

DAVIDA JOHNSON, et al., *Appellees,*

UNITED STATES OF AMERICA, *Appellant,*

v.

DAVIDA JOHNSON, et al., *Appellees,*

LUCIOUS ABRAMS, JR., et al., *Appellants,*

v.

DAVIDA JOHNSON, et al., *Appellees.*

On Appeal From The United States District Court For The Southern District Of Georgia

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QUESTIONS PRESENTED

1. Whether a congressional district that is not bizarre on its face and whose district lines, as established by the evidence at trial, comport with traditional districting principles is, nevertheless, subject to strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment if race was the substantial or motivating factor in the creation of the district at issue.

2. Whether remedying past discrimination in voting is a compelling justification for a state to engage in race-conscious redistricting.

3. Whether the district court correctly held that compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, is a compelling state interest sufficient to justify race-conscious redistricting *only if* the resulting district lines were "actually necessary" to comply with the Voting Rights Act, based on a *post hoc* review of the correctness of the Attorney General's Section 5 determination.

4. Whether the district court erred in ruling that the Eleventh District failed to satisfy the narrow tailoring prong of strict scrutiny analysis because it was not "necessary" to draw that District in the precise configuration employed by Georgia.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. GEORGIA'S ELEVENTH DISTRICT IS NOT SO BIZARRE AS TO REQUIRE STRICT SCRUTINY OR TO CONFER STANDING UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 7

A. Strict Scrutiny Is Appropriate Only Where The District Is So Bizarre On Its Face As To Suggest That Race Was The Only Factor In Its Creation 7

B. Because The Eleventh District Is Not Bizarre In Shape, White Voters Lack Standing To Challenge It On Equal Protection Grounds 13

II. EVEN UNDER A STRICT SCRUTINY ANALYSIS, GEORGIA HAD A COMPELLING JUSTIFICATION TO ADOPT THE ELEVENTH DISTRICT 16

III. NARROW TAILORING ANALYSIS IN VOTING RIGHTS CASES SHOULD BE FLEXIBLE 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 14, 18

Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983) 18

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 7, 17, 18

Clark v. Roemer, 500 U.S. 646 (1991) 1, 19

Clinton v. Smith, 488 U.S. 988 (1988) 1

Connor v. Finch, 431 U.S. 407 (1977) 1

Gaffney v. Cummings, 412 U.S. 735 (1973) 27

Georgia v. United States, 411 U.S. 526 (1973) 24

Johnson v. De Grandy, ___ U.S. ___, 114 S. Ct. 2647 (1994) 8, 26

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) (three-judge court).....2, 9, 10, 16, 18

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 21 19

Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130 (1992) 14

McCain v. Lybrand, 465 U.S. 236 (1984) 17, 22, 23

McDaniel v. Sanchez, 452 U.S. 130 (1981).....22, 24

Morris v. Gressette, 432 U.S. 491 (1977) 22

Perkins v. Matthews, 400 U.S. 379 (1971) 23

TABLE OF AUTHORITIES – Continued

Page

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 27

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 21

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court), *juris. statement filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923) 6, 18, 25

Shaw v. Reno, 509 U.S. ___, 113 S. Ct. 2816 (1993) ..... *passim*

United Jewish Orgs. of Williamsburgh v. Carey, 430 U.S. 144 (1977) 4, 8, 14, 15

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 9

Whitcomb v. Chavis, 403 U.S. 124 (1971) 15

White v. Regester, 412 U.S. 755 (1973) 15

Wise v. Lipscomb, 437 U.S. 535 (1978) 27

Wright v. Rockefeller, 376 U.S. 52 (1964) 8, 14

Wygant v. Jackson Bd. of Educ., 476 U.S. 276 (1986) 17, 18

STATUTES AND FEDERAL REGULATIONS

42 U.S.C. § 1973c 22

28 C.F.R. § 51.28(h) (1994) 19

28 C.F.R. § 51.29 (1994) 19

28 C.F.R. § 51.38 (1994) 19

TABLE OF AUTHORITIES – Continued

Page

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S. REP. NO. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 20

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H.R. REP. NO. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277 18

Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act, 97th Cong., 2d Sess. (1982)..... 26

Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)..... 20

Hearings on S. 407, 903, 1297, 1409 and 1443 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 20

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief as *amicus curiae* with the consent of the parties in support of appellants' argument that the Eleventh District of Georgia's 1992 congressional redistricting plan does not violate the Equal Protection Clause of the Fourteenth Amendment. Protection of the voting rights of minorities is an important aspect of the Lawyers' Committee's work, as demonstrated by its frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented black citizens in voting rights cases before this Court, including *Clark v. Roemer*, 500 U.S. 646 (1991), *Clinton v. Smith*, 488 U.S. 988 (1988), and *Connor v. Finch*, 431 U.S. 407 (1977), and has appeared as *amicus curiae* in other significant voting rights cases in this Court, including *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816 (1993).

STATEMENT OF THE CASE

On January 13, 1994, appellees, who are white residents of Georgia, filed suit alleging that Georgia's Eleventh District in its 1994 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. Following a seven-day trial, a three-judge district court,

over a dissent by Judge Edmondson, issued a *per curiam* opinion holding that the Eleventh District was subject to strict scrutiny under the Equal Protection Clause and failed that standard. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994).

In its opinion, the district court excoriated the Department of Justice (the "Department" or "DOJ") for accepting input from black legislators represented by the American Civil Liberties Union ("ACLU") and other sources. *See id.* at 1368 ("Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."). The district court further chastised the Department for, in the majority's view, improperly seeking to ensure proportional representation for black citizens of Georgia. *Id.* at 1379, 1385-86.

With regard to the applicability of the strict scrutiny standard, the district court held that, whether or not the Eleventh District was "bizarre" in shape, it was nevertheless subject to strict scrutiny if "race was the *substantial or motivating consideration* in creation of the district in question." *Id.* at 1372 (footnote omitted). The court then found that race was such a factor in the design of the Eleventh District, allegedly because Georgia sought to comply with demands by the ACLU and the Department for a third majority-minority district. *Id.* at 1375-78.

With regard to the application of the strict scrutiny standard, the district court held that, in order to establish a compelling justification for its use of race in drawing district lines, the state had to prove, not only that it reasonably believed that the creation of the Eleventh

District was necessary to comply with the Voting Rights Act and to obtain preclearance from DOJ, but also that it was "actually necessary" to structure the Eleventh District's lines as drawn in order to comply with the Act. *Id.* at 1382, 1383. The district court then found that the Eleventh District was not "necessary" and, hence, was unconstitutional. *Id.* at 1393.

SUMMARY OF ARGUMENT

In *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816 (1993), this Court held that a congressional district could be so "bizarre" in its shape as to raise, presumptively, a question under the Equal Protection Clause. That threshold question is, in this Court's words, whether the district in question is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that [such] segregation lacks sufficient justification." *Id.* at ___, 113 S. Ct. at 2832. If, and only if, this "allegation of racial gerrymandering remains uncontradicted, the District Court must determine whether the . . . plan is narrowly tailored to further a compelling governmental interest." *Id.*

Thus, *Shaw* holds that, presumptively, race alone is not a proper basis to draw district lines. That does not mean, however, that a state cannot consider race, along with other factors, in drawing district lines. It means only that if the district lines are so bizarre as to suggest that race alone, without regard to traditional redistricting principles, led to their design, and the state cannot rebut

that suggestion or satisfy strict scrutiny standards, then the district at issue is unconstitutional. But a state can consider race as a significant factor in drawing district lines so long as it does not ignore all other relevant factors.

Simply put, *Shaw* did not overrule *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (plurality opinion) ("*UJO*"). Instead, *Shaw* cautions that race-conscious redistricting must consider other relevant potential concerns; race cannot be the only justification for district lines.

The district court erred by assuming that *Shaw* justifies or warrants a detailed inquiry into legislative motives in drawing district lines and, if race was "the substantial or motivating consideration," then strict scrutiny applies. By its very terms, *Shaw* applies only to districts that are objectively bizarre; *Shaw* does not authorize district courts across the country to engage in the weighing of legislative intent in the absence of vote dilution or truly bizarre district shape, especially under such amorphous standards as "substantial" or "motivating." Particularly in light of the myriad of political compromises that go into the approval of any redistricting plan, it is simply unworkable and inappropriate to require courts to divine the intent of the legislature as a whole as a precondition for upholding a plan.

Properly read, *Shaw* requires an objective test of the "bizarreness" of the district lines at issue to determine if it appears that race was the only factor in their creation. Where, as here, that is not so, because the district is consistent with traditional districting principles, or with

other districts in the plan or with historical districts, the inquiry ends. Race-conscious redistricting, so long as it does not ignore all other factors, is not illegal in the absence of any dilutive effect.

Moreover, even if the Eleventh District were subject to strict scrutiny review, the district court erred in its application of that standard. A state's reasonable belief that it must draw one or more majority-minority districts in order to comply with the Fifteenth Amendment or the Voting Rights Act is a sufficiently compelling justification for race-conscious districting, whether or not that belief ultimately, in the district court's judgment, turns out to be correct. To hold otherwise would say to states that their attempts to comply voluntarily with constitutional and statutory mandates or to cooperate with the Department are at their peril, subject to picayune second-guessing by the courts.

Indeed, for states subject to Section 5 of the Voting Rights Act, the district court's holding requires them not only to obtain DOJ preclearance, but also to evaluate whether the Department's views are not just reasonable but also whether they will be found to be actually correct by a three-judge district court. That holding goes far beyond this Court's precedents on the "strong basis in evidence" necessary to justify racial remedial actions. Moreover, for a Georgia district court to judge the Department's position in that way flies in the face of the Voting Rights Act itself, which provides that only the District of Columbia District Court has jurisdiction to review DOJ's preclearance decisions.

Furthermore, the district court's harsh attacks on the Department, the ACLU, and black legislators for their communications concerning Georgia's proposed redistricting plans are unwarranted and misguided. The Department's regulations specifically encourage the receipt of information from outside sources, including minority citizens and their representatives, and such input is frequently essential given the Department's lack of field staff and limited investigatory resources. Indeed, it would be highly undesirable to require the Department to base its Section 5 determinations on only that information which the submitting jurisdiction chooses to provide. Black citizens in Georgia are rightfully bewildered to find the federal courts angrily denouncing civil rights lawyers for advocating, and the Department for considering, their views.

In sum, as long as the Department's preclearance decision was not insupportable, or the state's decision that a majority-minority district was necessary to comply with Section 2 of the Voting Rights Act was reasonable, then there is a sufficiently compelling justification to engage in race-conscious redistricting. That standard was amply met below.

Finally, the district court employed an incorrect legal analysis in holding that the Eleventh District was not narrowly tailored, because that court did not adequately consider the significant differences between race-conscious redistricting and other types of race-conscious state action. As the court held in *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court), *juris. statement filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923), any application of the narrow tailoring standard

to voting rights cases must take into account the difference between the consideration of group characteristics that necessarily determine district lines and the individual rights at issue in such cases as *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Application of the narrow tailoring standard to voting rights cases must also consider this Court's traditional deference to the autonomy of the states in redistricting decisions.

ARGUMENT

I. GEORGIA'S ELEVENTH DISTRICT IS NOT SO BIZARRE AS TO REQUIRE STRICT SCRUTINY OR TO CONFER STANDING UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Strict Scrutiny Is Appropriate Only Where The District Is So Bizarre On Its Face As To Suggest That Race Was The Only Factor In Its Creation

In *Shaw v. Reno*, this Court held that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." 509 U.S. at ___, 113 S. Ct. at 2826 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). In those exceptional cases, a district can be so "bizarre" on its face that "it rationally can be viewed only as an effort to segregate the races for the purposes of voting, without regard for traditional districting principles and without sufficient compelling justification." *Id.* at ___, 113 S. Ct. at 2824.

This Court did not, however, hold in *Shaw* that race-conscious redistricting that was not "bizarre" is subject to constitutional challenge. To the contrary, the *Shaw* Court expressly approved the appellants' concession there that race-conscious redistricting is not *per se* unconstitutional because "[t]his Court never has held that race-conscious decisionmaking is impermissible in *all* circumstances." *Id.* at ___, 113 S. Ct. at 2824. Indeed, this Court has recently accepted the concept of race-conscious redistricting in, among other cases, *Johnson v. De Grandy*, ___ U.S. ___, 114 S. Ct. 2647 (1994). *See also UJO*, 430 U.S. 144.

There is, of course, no way around that conclusion because, given the demographic information available to legislators in drawing district lines, race-*unconscious* districting is impossible. As the *Shaw* Court recognized,

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

509 U.S. at ___, 113 S. Ct. at 2826; *see also Wright v. Rockefeller*, 376 U.S. 52 (1964) (creation of majority-minority districts using traditional districting principles held constitutional).

In short, *Shaw* most certainly does not hold that race-conscious redistricting is unconstitutional; *Shaw* holds only that district lines that are so irregular that race

appears to be their *only* explanation may be unconstitutional if the state does not identify other factors considered or provide a compelling justification.

The district court below went far beyond that narrow holding. The district court found that, even if the district lines in question were entirely regular, a district may be subject to strict scrutiny if race was the "substantial or motivating consideration" in the drawing of the district lines. *Johnson*, 864 F. Supp. at 1372. That holding was wrong.

As an initial matter, it is difficult enough to determine what language in a statute means by referring to printed legislative histories. It is extremely problematic to determine at a trial how important a factor race was in approving a particular redistricting plan. As just two examples, a legislator whose own district was safely drawn in another corner of the state may have cared not at all whether the Eleventh District was majority-black or majority-white so long as his district was inviolate. Another legislator whose district bordered the Eleventh District may have been equally indifferent to the racial make-up of the Eleventh District so long as the common border with his district remained unchanged. Given the many political compromises that go into the approval of any redistricting plan, it would be unworkable to predicate a plan's constitutionality on a court's after-the-fact calibration of precisely how important race was to legislators' approval of the plan.[1] *See, e.g., Village of Arlington*

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[1] Indeed, the district court itself recognized that "legislative intent is notoriously difficult – if not logically impossible –

Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n.18 (1977) (acknowledging the difficulty in assessing the decisional motivations of a legislative body, particularly in light of legislative privilege and the problems created by the substantial intrusion that judicial inquiry into legislative or executive motivation represents). This is particularly true if the constitutional standard is not predicated on a showing of discriminatory effect based on a concrete injury, such as dilution of voting strength.

Moreover, the notion that race as a substantial consideration is enough to submit a majority-minority district to constitutional challenge would mean that every majority-minority district in this country would be subject to such a claim. The district courts would be flooded with such litigation every ten years. Indeed, majority-white districts might be just as open to challenge: legislators are every bit aware of the racial consequences when they draw a majority-white district as when they draw one that is majority-black.

Logic alone compels the conclusion that the district court's intent standard is unworkable. Consider the following two hypotheticals: assume a state entitled to eight members of Congress with a population 75% white and 25% black. If that population were randomly distributed throughout the state, and it was not possible to draw a contiguous majority black district, one would expect each district to be 75% white and 25% black. *Shaw* states that strict scrutiny would apply to weirdly shaped district

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to ascertain." *Johnson*, 864 F. Supp. at 1374 (citing *Rogers v. Lodge*, 458 U.S. 613, 631-53 (1981) (Stevens, J., dissenting), and *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)).

lines (which these hypothetical facts would require) drawn simply to ensure two black majority districts.

Assuming, however, the same racial breakdown with black citizens concentrated in discrete parts of the state, it would not be surprising if one or more districts were majority black. In fact, for states subject to Section 5 of the Voting Rights Act because of prior discrimination, district lines which did not result in one or more majority-minority districts could well be suspect and unlikely to obtain DOJ preclearance. Nevertheless, the intentional creation of even one majority black district in a state with these facts would be subject to strict scrutiny analysis if drawn intentionally, under the district court's holding. That makes no sense.

In sum, contrary to the district court's underlying assumption below, race-conscious redistricting is both necessary and beneficial, so long as it also considers other traditional districting principles as required by *Shaw*. As *Shaw* itself points out, this country has a long and unhappy history of race discrimination which cannot be ignored. If we are some day to become the color blind society to which we aspire, we ignore that history at our peril. Voting should be color blind, but it is not as yet. It will become so only if blacks do not feel discriminated against as voters by being kept in minority status, unlikely or unable to elect representatives of their own race. It will become so only if some blacks are in fact elected to political office where they can make their views known to white officeholders and impress white voters with their competence. "The opportunity to hold office and to make a record while in office is perhaps the most

important means whereby minority candidates can establish a reputation that will earn them considerable cross-over support. . . . [M]inority politicians are often able to get started because of majority-minority districts." BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136-37 (Cambridge Univ. Press 1992). Moreover, a legislature with some minority members is obviously less likely to discriminate in its legislation.

Shaw is consistent with this analysis. It simply adds an important caution. It says that it is wrong to distort the normal political process by creating a majority-black district where to do so requires ignoring essentially all other relevant considerations.

Measured by that standard, the Eleventh District is plainly not bizarre or suspiciously irregular. As Judge Edmondson discussed below in his dissent:

> 1. The size of the district is not particularly noteworthy. . . .
>
> 2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1,243 miles) or the Eighth (1,155 miles) Districts.
>
> 3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire state. But, the Ninth District spans the entire northern border of the state and the First, Second and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State.
>
> 4. The Eleventh District shows considerable respect for existing political boundaries. . . .

> 5. In addition, eighty-three percent of the Eleventh's area comes from whole counties. . . .
>
> 6. Georgia's congressional districts have no tradition of being neat, geometric shapes. . . .
>
> 7. That the Eleventh District splits eight counties is unremarkable. . . . Splitting counties in Georgia's congressional districts for reasons wholly unrelated to race is part of Georgia's history. . . .
>
> 8. Qualitative measurements for compactness, such as perimeter and dispersion measurements, show the Eleventh District is not bizarre or highly irregular. . . .

864 F. Supp. at 1396-97 (Edmondson, J., dissenting).

Whatever visceral reaction one might have to the design of the Eleventh District on a map, as Judge Edmondson's dissent makes clear, further analysis proves beyond any reasonable doubt that it is not bizarre in the context of Georgia's redistricting plan. That should be the end of the analysis under *Shaw*.

B. Because The Eleventh District Is Not Bizarre In Shape, White Voters Lack Standing To Challenge It On Equal Protection Grounds

Under *Shaw*, in those exceptional circumstances where there is demonstrable proof that a majority-minority district is so bizarre in shape as to suggest that race was the only factor in its creation, then white voters may have standing to assert an Equal Protection challenge. As the *Shaw* Court explained:

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.

509 U.S. at ___, 113 S. Ct. at 2828.

Absent those exceptional circumstances – that is, absent the presumption, based on a showing of a bizarre district shape, that race was the only factor considered in drawing the district lines at issue – it is and should be virtually impossible for a voter to show sufficient harm to acquire Equal Protection standing.[2] Obviously, the fact that a district has a white or black majority is not enough. *See UJO*, 430 U.S. at 162-63; *Wright*, 376 U.S. at 516. Even the fact that the district was knowingly so designed is not enough, since racial composition is always known and taken into account, along with other group-related factors, in drawing district lines. Indeed, given our history

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[2] This Court has consistently held that a federal court may only decide a constitutional challenge to a legislative act when asked to do so by a plaintiff who can demonstrate that he or she has personally suffered, or is in imminent danger of suffering, an actual, concrete injury that is "fairly traceable" to the challenged legislative act and is likely to be redressed by the relief sought. *See Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992); *see also Allen v. Wright*, 468 U.S. 737, 750-55 (1984) (black plaintiffs lack standing to challenge tax benefits for racially discriminatory private schools by alleging "stigmatic injury" resulting from governmental action).

of racial discrimination, lines which created a narrow white majority where a black majority was equally feasible would almost surely be suspect.

This Court has consistently held that, in cases where race was a factor but not the only factor, in drawing district lines, challengers must demonstrate that the redistricting plan operates to minimize or cancel out the voting strength of the racial group as a whole. *See, e.g., White v. Regester*, 412 U.S. 755 (1973) (in state legislative reapportionment plan, relatively minor population deviations among districts did not substantially dilute the weight of individual votes so as to deprive voters of fair and effective representation); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (holding that plaintiffs' burden is to establish that the political process is not equally open to participation by the group in question and that its members had less opportunity than did residents in the district to participate in the political processes and to elect legislators of their choice). In the context of an Equal Protection challenge to race-conscious redistricting, this Court expressly held in *UJO* that as long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race." 430 U.S. at 166.

There is no question that *Shaw* eased the requirements of proving injury through vote dilution where proof of a bizarre district shape is shown. But it certainly did not suggest, as the district court below would have it, that any time race is a factor in redistricting, standing exists. The importance of the requirement of a bizarre shape that defies, on its face, any explanation other than

race alone, is therefore critical to the threshold standing issue – unless this Court means to overrule decades of voting rights precedents and to open the floodgates for voting rights litigation. *Shaw* does not require, or sanction, such a result. Nor should this Court change settled precedent to allow such a result.

II. EVEN UNDER A STRICT SCRUTINY ANALYSIS, GEORGIA HAD A COMPELLING JUSTIFICATION TO ADOPT THE ELEVENTH DISTRICT

Even assuming that strict scrutiny were warranted here, the district court erred in its application of strict scrutiny to this voting rights case. The district court assumed that the only possible compelling justification for race-conscious redistricting is compliance with the Voting Rights Act. The district court further held that Georgia's motive to comply with the Act and to obtain DOJ preclearance under Section 5 is only sufficient if the resulting district was "actually necessary" to comply with the Voting Rights Act. *Johnson*, 864 F. Supp. at 1382. And then, acting as if it were the District Court for the District of Columbia, it reviewed the Department's judgments and Georgia's redistricting plan and concluded the plan was not "actually necessary" because it did more than was absolutely required to comply with the Act.

The district court was wrong on all counts. *First*, the district court's analysis ignores a state's political interests in taking into consideration in drawing district lines the views of a minority population that has been the victim of discrimination and racially polarized voting. That interest is no less important because the minority is

defined by race rather than religion, or sex, or political party.

Second, as this Court has often recognized, a state's interest in remedying the effects of its own past or present racial discrimination is sufficiently compelling to support race-based remedial action, with or without the incentive of a statute such as the Voting Rights Act. *See Croson*, 488 U.S. at 491-93 (plurality opinion); *id.* at 518 (Kennedy, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 280-82 (1986) (plurality opinion); *id.* at 286 (O'Connor, J., concurring). Furthermore, this Court has held that a state need not await a judicial finding of discrimination before undertaking affirmative action, so long as it has a "strong basis in evidence" for concluding that such remedial action is "necessary." *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277. In short, whether or not the Voting Rights Act ever existed, Georgia has a compelling justification – indeed, an obligation – to remedy its own history of discrimination against blacks in voting (and every other phase of life), and to ensure that that history is not repeated today.

Georgia plainly has a strong basis in evidence to believe that it was guilty of racial discrimination in voting in the past which justifies remedial action today. Indeed, the mere fact that Georgia is subject to Section 5 of the Voting Rights Act, which requires states or other political subdivisions to obtain preclearance of any changes in voting procedures *because* they discriminated against minorities in voting in the past, is compelling proof on that score. *See McCain v. Lybrand*, 465 U.S. 236, 244-45 (1984) (Section 5 coverage is based on findings of a state's violations of the Fifteenth Amendment). Moreover,

Georgia's history of racial discrimination in voting is well-documented. Even the district court below found that it could take judicial notice of Georgia's past discrimination in voting. *Johnson*, 864 F. Supp. at 1379; *see also Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983).

And *third*, the Voting Rights Act, in any event, provides a compelling justification for race-conscious redistricting. Indeed, the *Shaw* Court itself specifically confirmed that states "have a very strong interest in complying with [the Voting Rights Act], at least to the extent it is constitutionally valid as interpreted and as applied." 509 U.S. at ___, 113 S. Ct. at 2830.

Voluntary compliance with a state's obligation to remedy past discrimination and with the Voting Rights Act is, of course, to be encouraged. In fact, the whole purpose and administrative scheme of that Act is intended to encourage voluntary compliance. H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284; *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

Simply put, so long as a state has a reasonable basis to believe that the inclusion of one or more majority-minority districts within its redistricting plan is necessary to comply with the Voting Rights Act, that belief is sufficient to provide a compelling justification for race-conscious redistricting. *Compare Croson*, 488 U.S. at 500 (evidence "approaching a *prima facie* case of a constitutional or statutory violation"); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("demonstrable evidence . . . sufficient to support a *prima facie* Title VII . . . claim");

see also Johnson v. Transportation Agency, 480 U.S. 616, 650-52 (1987) (O'Connor, J., concurring) (evidence sufficient for a "Title VII *prima facie* case").

Here, of course, that "reasonable basis" is amply supplied by the Department's refusal to preclear Georgia's first two redistricting plans which included only two majority-minority districts. The DOJ was given a role by Congress which recognizes its expertise in matters of race and requires that its administrative expertise be given proper respect and deference. The district court's refusal to accept the significance of the Department's decision not to preclear Georgia's first two plans reflects an open hostility to the Department that cannot be squared with the Department's duties under the Voting Rights Act. Indeed, the district court's vituperative attacks on the Department for its use of sources other than Georgia's Attorney General and the Department's supposed cooperation with the ACLU are, frankly, difficult to fathom. The Department has to review literally thousands of voting changes, with a limited staff and budget. *See Clark v. Roemer*, 500 U.S. 646, 657-58 (1991). It necessarily must rely on assistance from outside sources and it would not make sense to limit those sources to the party seeking preclearance. Without impugning the good faith of the Georgia Attorney General, it is hardly reasonable to expect the advocate for a redistricting plan to be entirely objective about its merits. For all those reasons, the Department's own Section 5 regulations have long encouraged the solicitation of the views of minority legislators and citizens, as well as those of their white counterparts. *See, e.g.*, 28 C.F.R. §§ 51.28(h), 51.29, 51.38 (1994).

The fact that the Department seeks such input is well known to Congress also – which has never objected to that process. *See, e.g.*, S. REP. NO. 97-417, 97th Cong., 2d Sess. 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 227 ("In fact, jurisdictions can and do informally discuss proposed changes in advance with the Department. The Department suggests that minority input be obtained and notes what factors must be taken into account to ensure that a change is acceptable."); *Hearings on S. 407, 903, 1297, 1409, and 1443 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 9 (1975) (statement of Hon. Hugh Scott, U.S. Senator from Pennsylvania) ("[s]ome of the submissions have already been modified after informal discussions with the Department's representatives, or changes are negotiated after submission. . . . In Georgia, the initial redistricting plan for Atlanta would have made it more difficult for Congressman [Andrew] Young's candidacy, but substantial changes were required by the Department as a condition of approval.").[3]

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[3] During congressional hearings on the various extensions of Section 5, numerous representatives of civil rights organizations, including the director of the ACLU's Southern Regional Office, described their "common practice" of communicating with the Department of Justice concerning pending Section 5 submissions. *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 747 (1981) (colloquy between Laughlin McDonald and Congressman Donald Edwards); *id.* at 931-32 (testimony of Joaquin Avila, Mexican American Legal Defense & Educational Fund, Inc., describing advocacy in Section 5 administrative preclearance process). Black state legislators testifying in support of Section 5 have also described, during congressional hearings, their efforts to

Thus, regardless of its sources of information, the DOJ's refusals to preclear Georgia's first two redistricting plans were certainly sufficient to provide Georgia with a compelling justification to add a third majority-minority district. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J.) (Section 5 objection by DOJ is properly viewed as "an administrative finding of discrimination" which is sufficient to justify race-based remedial action).

The district court incorrectly held that any justification supplied by the state's efforts to comply with the Voting Rights Act and DOJ's preclearance requirements evaporates once the court, *ex post facto*, concludes that the district at issue is not as narrowly tailored as possible.

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secure Justice Department objections to discriminatory legislative enactments. *Id.* at 383-84 (testimony of L. Douglas Wilder, Virginia State Senator, discussing ongoing effort to secure Justice Department objection to Virginia legislative redistricting plan); *see also Hearings on S. 818, 2456, 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st and 2nd Sess. 398 (1969 and 1970) (testimony of Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights) (noting that Department of Justice, in determining whether a submitted law has a discriminatory effect or purpose, obtains information from "the local election officials, from civil rights leaders, from its own attorneys in the field or from the FBI"). As noted in one study of Section 5 enforcement, "[t]o counterbalance its lack of field staff, the voting section maintains a permanent registry of minority officials, minority group leaders, and other informed citizens to help evaluate the impact of a proposed voting change." *See* HOWARD BALL ET AL., *The View from Georgia and Mississippi: Local Attorneys' Appraisal of the 1965 Voting Rights Act, in* MINORITY VOTE DILUTION 190 (C. Davidson ed. 1984).

Most obviously, such a rule effectively makes the district court for the Southern District of Georgia the appellate reviewer of the Department's preclearance decisions. Under the jurisdictional scheme enacted by Congress, however, only the District Court for the District of Columbia may assess the validity of a Section 5 objection. 42 U.S.C. § 1973c; *see McCain*, 465 U.S. at 246-47 (jurisdiction to make Section 5 determinations rests exclusively with the Attorney General or the District Court for the District of Columbia); *McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1981) ("[t]he procedures contemplated by [Section 5] reflect a congressional choice in favor of specialized review - either by the Attorney General of the United States or by the United States District Court for the District of Columbia").[4] That jurisdictional restriction was no accident. Jurisdiction in the District of Columbia was intentionally prescribed in the Act to remove potential political pressures on judges in the identified discriminatory states, and to promote uniformity and centralization in decision-making under Section 5. *See, e.g.*, FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 29 (U.N.C. Press 1990) (citing difficulties of piecemeal litigation over voting rights abuses in southern states as impetus for Section 5). "[C]entralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." *McDaniel*, 452 U.S. at 151 (footnote

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[4] Strictly speaking, even the District Court for the District of Columbia does not review the correctness of the Attorney General's Section 5 determinations, but instead determines *de novo* whether preclearance is warranted. *See Morris v. Gressette*, 432 U.S. 491, 505 & n.21 (1977).

omitted). As the Senate Report accompanying the 1975 extension of Section 5 noted, "The Attorney General and the United States District Court for the District of Columbia, as the experts in the area, have developed familiarity with the impact of discriminatory voting systems, and it is they who should assess the discriminatory impact of a system." S. REP. NO. 94-295, 94th Cong., 1st Sess. 19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785. For these reasons, as this Court held in *Perkins v. Matthews*, 400 U.S. 379, 385 (1971), "[w]hat is foreclosed to such [local] district courts is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General – the determination whether a covered change does or does not have the [proscribed] purpose or effect."

Furthermore, the district court's rule requiring states to prove the correctness of the Attorney General's Section 5 determination in local federal district courts thoroughly undercuts any notion of voluntary compliance with the Act. If every plan that includes a majority-minority district will be subject to second-guessing by the local district court, then the state might as well institute its own action challenging the Attorney General's determination first in order to save time and avoid potential disruption of elections. This undermines Section 5's purpose of providing an administrative preclearance route as a more efficient alternative to litigating preclearance in a district court proceeding. *McCain*, 465 U.S. at 246-47. Furthermore, under the district court's approach, recalcitrant jurisdictions would have a route to circumvent the Section 5 preclearance regime established by Congress – with

its concomitant burden of proof on the submitting jurisdiction. *Georgia v. United States*, 411 U.S. 526, 537-39 (1973). If a redistricting plan is blocked by the Department, the jurisdiction would no longer need to seek preclearance in the District of Columbia, but could simply await the filing of a local lawsuit by a disgruntled voter or candidate. The creation of such loopholes and opportunities for evasion has been strongly resisted by this Court. *See McDaniel*, 452 U.S. at 149 (holding that legislatively enacted redistricting plans must be submitted for Section 5 preclearance even when plan was enacted in response to federal court order, in part because contrary rule might encourage jurisdictions to evade Section 5 review process through involvement in local litigation).

In sum, so long as a state's or the Department's belief that a majority black district is necessary to avoid racial discrimination in the present or to remedy racial discrimination from the past or to comply with the Voting Rights Act, a state has a compelling justification to engage in race-conscious redistricting.

III. NARROW TAILORING ANALYSIS IN VOTING RIGHTS CASES SHOULD BE FLEXIBLE

The district court employed an incorrect legal analysis in holding that the Eleventh District was not narrowly tailored. The court failed to consider adequately the important differences between race-conscious redistricting and other types of race-conscious state action.

While there is guidance to be had from equal protection precedents in other contexts, voting rights cases are different because of (1) the nature of the alleged injury in

such cases and (2) the fact that voting is fundamental to government protection of rights in many areas other than voting and to confidence in the fairness of our political system overall. Voting rights cases involve group, not individual, injuries. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court). If one balances the amorphous potential injury to white voters (a very substantial majority in all fifty states) from race-conscious redistricting that does not dilute their group voting strength overall against the objective of achieving trust by blacks in an overwhelmingly white political system, this Court, we submit, should be lenient in allowing states considerable discretion in deciding how to draw district lines that permit effective political participation by minority citizens.

> "Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens." What is true of voting is also true of electing candidates of choice. Where the ability to elect such candidates is systematically denied, a group long frozen out of the political process is denied the full measure of citizenship that has long remained beyond its grasp.

QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 16 (C. Davidson & B. Grofman eds., Princeton Univ. Press 1994) (quoting KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (Yale Univ. Press 1989)). As former Attorney General William French Smith stated in congressional hearings on the extension of the Voting Rights Act of 1982:

> [I]t is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature. That purpose was to encourage States and localities to bring blacks and other racial minorities into the mainstream of American political life.

Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act, 97th Cong., 2d Sess. 68-69 (1982).

Where, as here, the state is attempting to create enough majority-minority districts so that their percentage as against the total number of districts in the plan roughly approximates the percentage of minority voters in the state as a whole, the state is entitled to some leeway in drawing district lines. *Cf. De Grandy*, ___ U.S. at ___, 114 S. Ct. at 2658 & n.11 (endorsing the notion of proportionality between the number of majority-minority districts and the number of minorities in the relevant population as a rough proxy for the equality of political and electoral opportunity that the Voting Rights Act guarantees). To hold, as the district court effectively did below, that a majority black district is not narrowly tailored if the district line turns left at some point where the district court thinks it should have turned right, effectively arrogates to the district court the real power to draw district lines whenever an equal protection claim is at issue and essentially blesses court-created lines which will surely be perceived by blacks as discriminatory.

Such a rule is flatly inconsistent with this Court's well-established deference to the states, under principles of federalism, in districting decisions. As this Court has stated, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, .the States must be allowed both predictability and efficiency in structuring their governments." *Presley v. Etowah County Comm'n*, 502 U.S. 491, ___, 112 S. Ct. 820, 832 (1992). "[R]edistricting and reapportioning legislative bodies is a legislative task," *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), which "deal[s] . . . with fundamental 'choices about the nature of representation' [and] is primarily a political and legislative process," *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)). Moreover, in truth, there is little risk of injury to white voters from such deference: overwhelmingly white legislatures are unlikely to discriminate against whites as a group; it will be the rare case where judicial protection of white voters is either necessary or appropriate.

Accordingly, any narrow tailoring analysis must properly take into account the states' broad discretion to draw district lines – including district lines that recognize and protect minority voting strength.

CONCLUSION

For the reasons stated above, the district court's judgment should be reversed.

Respectfully submitted,

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Nos. 94-631, 94-797, 94-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, ET AL.
Appellants,

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DAVIDA JOHNSON, ET AL.
Appellees.

LUCIOUS ABRAMS, JR., ET AL.
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UNITED STATES
Appellant,

v.

DAVIDA JOHNSON, ET AL.
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

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On Appeal from the United States District Court for the Southern District of Georgia

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE BY THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

The Georgia Association of Black Elected Officials ("GABEO") hereby moves for leave to file a brief *amicus curiae* in the above-captioned cases.

GABEO is an organization of African Americans elected to public office in Georgia at the congressional, state, and local levels. GABEO is approximately 25 years old and has

more than 700 members. Its basic purposes are to promote excellence in public officials and inclusiveness in government. Throughout its history GABEO has supported the adoption of non-dilutive methods of election that ensure the full participation of all persons in the political and electoral processes.

GABEO has obtained the consent of counsel for the appellants in all three cases. Letters reflecting that consent have been filed with the Clerk of the Court. Counsel for appellees have refused to give their consent; however, they have informed counsel for GABEO that they will not oppose GABEO's motion for leave to file its brief.

GABEO's members and the constituents they represent may be directly affected by the decision of the Court in these cases. Its brief presents several important issues that have not been fully addressed by the parties. First, GABEO's brief explains why the broad reading of this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2618 (1993), offered by the court below runs afoul of the equal protection component of the Due Process Clause of the Fifth Amendment -- an argument not addressed, to our knowledge, by any of the parties. Second, GABEO's brief approaches both the question of appellees' standing and the differences between race consciousness in the districting process and race consciousness in other governmental decisionmaking from a different perspective than that taken by the parties.

WHEREFORE, GABEO moves that the Court permit the filing of its brief.

Respectfully submitted,

_____

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Georgia Association of Black
Elected Officials

Dated: February 21, 1995

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument

I. *Shaw v. Reno* Identified a Narrow Class of Exceptional Cases in Which Federal Judicial Intervention into the Political Processes of Redistricting Is Justified 5

II. The Differences Between Apportionment and Other Governmental Decisions Show Why Race Can Legitimately Be Taken Into Account in Drawing District Lines 12

III. *Shaw v. Reno* Must Be Read Narrowly to Avoid Denying African Americans the Equal Protection of the Laws Guaranteed by the Fifth Amendment 18

Conclusion 21

TABLE OF AUTHORITIES

Cases	*Pages*
Allen v. Wright, 468 U.S. 737 (1984)	3, 10
Baker v. Carr, 369 U.S. 186 (1962)	6, 14
Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983)	6
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	14
Davis v. Bandemer, 478 U.S. 109 (1986)	2 *passim*
Dickinson v. Indiana State Election Bd., 817 F. Supp. 737 (S.D. Ind. 1992)	17
Edmonson v. Leesville Concrete Co., 500 U.S. 616 (1991)	21
Gaffney v. Cummings, 412 U.S. 735 (1973) . .	9, 13
Growe v. Emison, 113 S.Ct. 1075 (1993)	5
Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994) (3-judge court), *probable juris. noted*, Nos. 94-558 and 94-627	21
Hunter v. Erickson, 393 U.S. 385 (1969) .	4, 18-19, 21
Johnson v. DeGrandy, 114 S.Ct. 2647 (1994) .	2, 5

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) (3-judge court) 7

Ex parte Levitt, 302 U.S. 633 (1937) 10

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) 3, 9

LULAC v. Clements, 999 F.2d 831 (5th Cir) (en banc), *cert. denied*, 114 S Ct 878 (1994) . . . 17

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 13

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.) 3-judge court), *aff'd*, 113 S.Ct. 30 (1992) . . . 18

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 14

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 12

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (3-judge court) 18

Shaw v. Reno, 113 S.Ct. 2816 (1993) . . . . . 2 *passim*

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . 5, 8

United States v. Richardson, 418 U.S. 166 (1974) 3, 10-11

Voinovich v. Quilter, 113 S.Ct. 1149 (1993) . . 5

Whitcomb v. Chavis, 403 U.S. 124 (1971) . . . 2, 15

Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986) 14, 15

Constitutional and Statutory Provisions

U.S. Const., amend. V 4, 20-21

U.S. Const., amend. XIV 20

Civil Rights Act of 1964 (codified as amended in scattered sections of 42 U.S.C. (1988)) . . . 16

Civil Rights Act of 1991 (to be codified in scattered sections of 42 U.S.C.) 16

Equal Employment Opportunity Act of 1972, (codified in 42 U.S.C. § 2000e (1988) 16

Fair Housing Act of 1968 (codified as amended at 42 U.S.C. § 3601 et seq. (1988)) 16

Fair Housing Amendments Act of 1988 (to be codified at 42 U.S.C. § 3601 et seq.) 16

Voting Rights Act of 1965, (codified as amended at 42 U.S.C. § 1973 et seq. (1988)) 16

Voting Rights Act Amendments of 1982 (codified at 42 U.S.C. § 1973 et seq. (1988)) 16

Other Materials

T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 Mich. L. Rev. 588 (1993) 13

Pamela S. Karlan, *The Rights To Vote: Some Realism About Formalism*, 71 Tex. L. Rev. 1705 (1993) 13

Pamela S. Karlan, *Undoing the Right Thing: Single Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1 (1991) 15

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993) 20

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) . . 10

S. Rep. No. 92-415, p. 10 (1971)) 16

Nos. 94-631, 94-797, 94-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, ET AL.

Appellants,

v.

DAVIDA JOHNSON, ET AL.

Appellees.

LUCIOUS ABRAMS, JR. ET AL.

Appellants,

v.

DAVIDA JOHNSON, ET AL.

Appellees.

UNITED STATES

Appellant,

v.

DAVIDA JOHNSON, ET AL.

Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BRIEF OF AMICUS CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Georgia Association of Black Elected Officials ("GABEO") is an organization of African Americans elected to public office in Georgia at the congressional, state, and local levels. GABEO is approximately 25 years old and has

more than 700 members. Its basic purposes are to promote excellence in public officials and inclusiveness in government. Throughout its history GABEO has supported the adoption of non-dilutive methods of election that ensure the full participation of all persons in the political and electoral processes.

SUMMARY OF ARGUMENT

This Court has long accepted the proposition that redistricting inevitably takes into account the competing claims of political, ethnic, racial, and socioeconomic groups. *See, e.g., Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994); *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). What distinguished the post-1990 round of reapportionment from its predecessors was not the sudden emergence of race consciousness but rather the unprecedented integration of Southern congressional delegations. This integration was achieved wholly by the state and federal political branches, without the need for direct judicial intervention.

Nothing in this Court's decision in *Shaw* was intended to reverse this development or to give the lower courts a warrant to upset the results of the political process of redistricting, especially when that process has neither denied nor diluted any individual's right to vote. *Shaw* should be read narrowly -- to permit lawsuits challenging the creation of majority-nonwhite districts *only* when the shape of such districts represents a clear deviation from the kind of districts the state has drawn for other politically cohesive groups *and* threatens either to exacerbate racial bloc voting or to deny members of the racial minority within a district fair

representation. The Court should also take this opportunity to make clear that *Shaw* did not suspend the normal rules for standing: a plaintiff who alleges nothing more than a generally available claim that the government has not complied with the Constitution cannot bring suit. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *United States v. Richardson*, 418 U.S. 166 (1974).

Shaw did not hold that all race-conscious districting was either impermissible or subject to heightened scrutiny. The Court should take this opportunity to reiterate that proposition. Districting differs from other governmental activity in four critical respects that explain why race-consciousness here cannot be subjected to the same type of strict scrutiny accorded other race-conscious action.

First, the very purpose of apportionment is to treat voters as members of *groups*; thus the usual alternative to group-based treatment -- individualized decisionmaking -- is unavailable.

Second, unlike most other contexts, there are no objective, neutral, or merit-based criteria that provide judicially discoverable and manageable standards for selecting particular district lines.

Third, given decennial reapportionment and the inherently partisan and subjective nature of the process, an individual voter has no settled, legally cognizable expectation of being placed in any particular district.

Fourth, as *Shaw*'s statement about the inevitable awareness of race in American politics implicitly recognizes, racial affiliation often describes politically cohesive communities of interest. In contemporary America, it may

be impossible fairly to represent ostensibly "political" interests if ethnicity is ignored. Race often serves as a shorthand or organizing principle for political communities. Given the intertwining of race and politics, a rule that treats all race-conscious districting with suspicion would raise serious questions of administrability: it would demand that federal courts artificially distinguish between race-based and political motivations.

Moreover, such a radical expansion of *Shaw* would raise a serious constitutional question. Decisions like the one below and in parallel cases from Texas and Louisiana make it more difficult for black voters to secure advantageous districts than for other voters to do so. Requiring regularity of boundaries for majority-nonwhite districts but not for majority-white districts constrains the options available to racial minorities in ways that other groups' options are not constrained. This approach turns the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries. As such, it would run afoul of this Court's decision in *Hunter v. Erickson*, 393 U.S. 385 (1969), and the equal protection component of the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. *Shaw v. Reno* Identified a Narrow Class of Exceptional Cases in Which Federal Judicial Intervention into the Political Processes of Redistricting Is Justified

This Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), should be understood in the context of the other voting rights cases of the 1992 Term. That same Term, this Court unanimously declined to strike down two other state apportionments, despite the fact that both processes were explicitly race-conscious and despite the fact that, in Ohio, the legislature explicitly and intentionally drew district boundaries to create majority-black constituencies. *See Growe v. Emison*, 113 S.Ct. 1075 (1993); *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Moreover, *Shaw* was decided against the backdrop of this Court's repeated holdings that "the power to influence the political process is not limited to winning elections," *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *see also Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring in the judgment); *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). And subsequent to *Shaw*, this Court once again recognized that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts." *Johnson v. DeGrandy*, 114 S.Ct. 2647, 2661 (1994).

The 1990 round of reapportionment reflected the increased ability of minority voters to "pull, haul, and trade," *Johnson*, 114 S.Ct. at 2661, in the intensely partisan world of redistricting. Some of the bargaining and horsetrading was purely internal to state legislatures, where representatives of the black community now sit in unprecedented numbers. Sometimes the minority community gained additional

leverage from the national political consensus that extended and amended the Voting Rights Act of 1965 and required federal preclearance for states like Georgia with a history of excluding black voters from the redistricting process. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (recounting the overt racism in Georgia's post-1980 congressional reapportionment), *aff'd*, 459 U.S. 1166 (1983). The results of the 1990 reapportionment are more than impressive: for the first time since Reconstruction, the legislative delegations of Southern states are racially integrated. More significantly, this long-desired, and long-resisted, integration was accomplished by the state and federal political branches, without the need for judicial intervention. The 1982 amendments and extension of the Voting Rights Act of 1965, and the post-1990 state legislative and federal executive responses, reflected "an aroused popular conscience that sear[ed] the conscience of the people's representatives" *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting), to make full integration of the American political process a reality.

This Court's decision in *Shaw* was not intended to reverse, and should not have the effect of reversing, this salutary development. In *Shaw*, this Court clearly refused to hold that this race-consciousness rendered *all* districting subject to heightened judicial scrutiny. *See Shaw*, 113 S.Ct. at 2824. Rather, it identified three circumstances under which heightened scrutiny of race-conscious districting is warranted.

First, and most importantly, *Shaw* limited judicial intervention to cases where the challenged district is "dramatically irregular," *id.* at 2820, "unusually shaped," *id.*, "extremely irregular on its face," *id.* at 2824, created "without regard for traditional districting principles," *id.*, "bizarre," *id.* at 2825, "irrational," *id.* at 2829, and designed

to "separate voters into different districts on the basis of race," *id.* at 2828. These repeated references were not surplus verbiage. Rather, they were intended to convey the message that black voters were entitled to the same benefits and opportunities in the political process that all other "political, religious, ethnic, racial, occupational, and socioeconomic groups," *Davis v. Bandemer*, 478 U.S. at 146 (O'Connor, J., concurring in the judgment), have traditionally enjoyed. If farmers, for example, or Irish-Americans, or Republicans, or the partisans of a particular aspirant for office have been able to create districts for themselves, then black voters should not be denied the same openings. Thus, *Shaw* required that challenged majority-black districts be viewed in context: are they decidedly *more* irregular than districts that have been drawn for other identifiable voting blocs, both in the past and contemporaneously? As Judge Edmondson's dissent below points out, the Georgia Eleventh Congressional District does not run afoul of this standard: its size is "not particularly noteworthy"; the length of its borders is "not distinctive"; its respect for political boundaries "places the Eleventh at the average for the State's ten other congressional districts"; and its use of "land bridges" is reminiscent of previously drawn majority-white districts within the state. *Johnson v. Miller*, 864 F. Supp. 1354, 1396 (S.D. Ga. 1994). Using one commonly employed measure of compactness, the district is more regular than forty-six other congressional districts. *Id.* at 1397. Under these circumstances, the Georgia Eleventh Congressional District does not fall within the narrow class of districts subject to heightened scrutiny.

Second, *Shaw* justified intervention when there was a concrete danger that a district's shape would communicate to elected representatives that "their primary obligation is to represent only the members of [the majority racial] group, rather than their constituency as a whole." *Shaw*, 113 S.Ct.

at 2827. This danger must be proved, rather than simply asserted or presumed:

> "the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election."

Davis v. Bandemer, 478 U.S. at 132 (opinion of White, J.); *see also Thornburg v. Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in the judgment); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In a case where the plaintiffs do not allege either that they have been denied the right to vote or that their votes have been diluted on account of race, they should be held to the standard for proving that they have not been adequately represented that was delineated by the *Davis* plurality. No proof was offered in this case to suggest that Representative McKinney has not represented all her constituents fairly or that the political interests of the plaintiffs in this case have been "entirely ignore[d]."

Third, *Shaw* suggested intervention might be appropriate if districting practices were shown to be "balkaniz[ing]," *id.* at 2832, that is, if the districting process "segregate[s]" voters on the basis of race, *id.* at 2824, and thereby threatens to "exacerbate ... patterns of racial bloc voting," *id.* at 2827. Again, however, this Court's decisions make clear that polarization cannot simply be assumed; it must be

proved. *Cf. Gingles*, 478 U.S. at 46. Nothing in the record in this case provides any basis for concluding that the contours of the Georgia Eleventh Congressional District have increased the level of racial bloc voting within its territory or have exacerbated racial polarization.

Nothing in *Shaw* suggests this Court intended to give disappointed aspirants for office, citizens across the state, or individuals who simply disagree with the outcome of the political process of districting a roving warrant to spend the remainder of the decade challenging the decennial reapportionment. Clearly, this Court did not intend to leave states "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent ... discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the judgment). The Court was well aware that the Voting Rights Act's various prohibitions on racial vote dilution *require* states to take race into account in the districting process; it was also realistic enough to recognize that legislators would take race into account in any event. *See Shaw*, 113 S.Ct. at 2826. Nor did this Court intend to smuggle in, through the back door, stringent constraints on the partisan aspects of redistricting which this Court had realistically accepted in *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *Davis v. Bandemer*.

Moreover, a broad reading of *Shaw* would seriously subvert this Court's standing doctrine. This Court has repeatedly held that standing is not conferred by "a generally available grievance about government -- claiming only harm to [the plaintiffs'] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lujan v. Defenders of Wildlife*, 112

S. Ct. 2130, 2143 (1992).[1] As *Allen v. Wright*, 468 U.S. 737, 754 (1984), explained, standing requires more than a "shared individuated right to a Government that obeys the Constitution."

Read broadly, *Shaw* would essentially overrule this Court's decision in *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). There, the Court held that a plaintiff who claimed that he could not "properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office" without detailed information about the CIA's budget lacked standing to challenge a statute which relieved the CIA of the obligation to make such disclosures. Richardson's complaint, like the claims of the plaintiffs in *Johnson* and the other post-*Shaw* cases, "is plainly undifferentiated and 'common to all members of the public.'" Of particular salience to this case, *Richardson* recognized, relying on *Ex parte Levitt*, 302 U.S. 633 (1937), that "if [the plaintiff's] allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet," the Court concluded, "even this was held insufficient to support standing because, whatever Levitt's injury, it was one he shared with 'all members of the public.'" *Richardson*, 418 U.S. at 178. *Richardson*'s analysis can be translated directly into the context of this case:

> It can be argued that if [appellees are] not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the

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[1] *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 881-82 (1983) ("[C]ourts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large.").

> argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the [reapportionment process] by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents ...; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress [in amending and extending the Voting Rights Act] ... Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

Richardson, 418 U.S. at 179. To confer citizen standing whenever a single individual disapproves of the outcome of the redistricting process -- without requiring that the plaintiff allege *and prove* the specific injuries *Shaw* identified -- would plunge the Court far further into the political thicket than any of its previous forays. *Cf. Davis v. Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment) (criticizing the plurality opinion because under its reasoning voters would be able to challenge apportionments if they lived outside the contested district or, indeed, outside the state).

Accordingly, the Court should take this case as an opportunity to reiterate the limited intervention authorized by *Shaw* and to instruct the lower courts to permit lawsuits challenging majority-nonwhite districts in the absence of any

claim of denial or dilution of the right to vote *only* when such districts both represent a clear departure from the state's normal districting practices *and* threaten either to exacerbate racial bloc voting within the challenged districts or to deny members of the numerical racial minority within the district fair and adequate representation and *only* when the plaintiffs can point to a concrete and particularized injury that *they* have suffered as a result of creation of the challenged districts.

II. The Differences Between Apportionment and Other Governmental Decisions Show Why Race Can Legitimately Be Taken Into Account in Drawing District Lines

Shaw recognized that "redistricting differs from other state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw*, 113 S.Ct. at 2826 (emphasis in original). In fact, the differences between redistricting and other governmental decisionmaking go beyond the legislature's mere awareness of race. These differences explain why race-conscious districting cannot be subjected to the same type of strict scrutiny accorded other race-conscious action.

It is not just with regard to race that different rules apply in the redistricting arena. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990), for example, this Court invoked the general principle that governmental distinctions among individuals based on their political affiliation are subject to heightened scrutiny; it held that "[u]nless ... patronage practices are narrowly tailored to further vital government interests, we must conclude that they

impermissibly encroach on First Amendment freedoms." Nonetheless, the Court has repeatedly upheld intentional political gerrymanders -- which by definition assign individuals to districts on the basis of political affiliation -- without requiring any special justification. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

The rationale for the different treatment of redistricting lies in the fact that the very purpose of apportionment is to treat voters as members of *groups* and to choose which of their group characteristics should be used to aggregate them for the purpose of electing representatives. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 Mich. L. Rev. 588, 600-01 (1993); Pamela S. Karlan, *The Rights To Vote: Some Realism About Formalism*, 71 Tex. L. Rev. 1705, 1712-13 (1993). Thus, apportionment decisions virtually *never* treat citizens as individuals.[2] Instead, apportionments rely on a series of gross, if politically astute, generalizations about the likely voting behavior of demographically identifiable groups.

By contrast, other sorts of government decisionmaking begin from "the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting) (internal quotation marks omitted;

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[2] Incumbent legislators, their relatives, and major campaign contributors sometimes form an exception to this general rule, and these exceptions can often account for irregularities in district shape. *See* Brief of Appellants Abrams *et al.* (describing how several distinctive geographic features of the Eleventh District reflect legislators' desires to place themselves or family members within particular congressional districts).

emphasis in original). In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for example, the alternative to racial set-asides was awarding contracts to the individual with the lowest competitive bid. In *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), the alternative to using race in deciding which teachers should be laid off was reliance on individual seniority. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the alternative to rigid race-conscious admission to medical school was resort to test scores, prior academic performance, and individual promise within the profession. The Court's analysis rested on two premises: first, that reliance on race can derogate from objective, race-neutral, individualized selection criteria, and, second, that race-conscious treatment may unnecessarily trammel the interests of individual citizens whose legitimate expectations have been foiled.

Neither of these principles operates with the same force on apportionment decisions. First, "[t]he key concept to grasp [about reapportionment] is that there are no neutral lines for legislative districts." *Davis v. Bandemer*, 478 U.S. at 129 n. 10 (opinion of White, J.).[3] There may be a set of "[t]raditional districting principles," *Shaw*, 113 S.Ct. at 2824 -- ranging from such easily measurable criteria as equality of population and contiguity through such inherently subjective criteria as respect for communities of interest and "political fairness." But beyond equipopulosity, there are few "judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. at 217, for deciding the relative weight of these interests with regard to where particular district lines should be placed. The tradeoff among protection of incumbents (with its attendant benefits to a state from

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[3] Quoting Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts* 7-8, in Representation and Redistricting Issue (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).

legislative seniority), geographic compactness, and partisan concerns -- to give just one example -- is a "political question in the truest sense of the word." *Davis v. Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment).

Moreover, given decennial reapportionment and the overtly partisan nature of the redistricting process, voters simply have no "settled expectations," *Wygant*, 476 U.S. at 283-84 (opinion of Powell, J.), about the contours of the district in which they will find themselves. Georgia gained a congressional seat between 1980 and 1990, and uneven growth of population within the state required further adjustments of 1980 district lines. Thus, no voter had any legally cognizable right to be placed in any particular district. Since the votes of the plaintiffs in this case and the other post-*Shaw* litigation were neither denied nor diluted, none of their expectations about the voting process were in any way impaired.

Not only is this Court's concern about objective standards not relevant in the redistricting context, but the second premise of its affirmative action jurisprudence -- that race-conscious behavior distinctively disadvantages the interests of white citizens -- is also inapposite. "Traditional districting principles" have always focused on "the competing claims of political, religious, *ethnic*, *racial*, occupational, and socioeconomic groups." *Davis v. Bandemer*, 478 U.S. at 146 (O'Connor, J., concurring in the judgment) (emphasis added). In the districting process, members of racially-defined groups occupy a position similar to many other politically cohesive groups such as "union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas." *Whitcomb v. Chavis*, 403 U.S. at 155. Such practices as the ethnically balanced ticket are a mainstay of American political history. *See* Pamela S. Karlan, *Undoing*

the Right Thing: Single Member Offices and the Voting Rights Act, 77 Va. L. Rev. 1, 35-36 (1991).

As long as all citizens are able to vote and no identifiable group's votes are diluted, the traditional values of descriptive representation and an ethnically diverse cast of elected officials serves a variety of important values. Fair representation of racially defined interests is critical to the functioning of the political process. This insight underlies this Court's racial vote dilution jurisprudence, which recognizes that individuals' policy preferences may often be correlated with, and sometimes even caused by, their racial identity. Much modern legislation is concerned with issues of racial discrimination,[4] and members of racial minority groups may be specially concerned with these issues. "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." *Wygant*, 476 U.S. at 290 (O'Connor, J. concurring) (quoting S. Rep. No. 92-415, p. 10 (1971)). *Shaw* sought to balance the danger to the perceived legitimacy of government from race-conscious redistricting against the danger to the perceived legitimacy of

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[4] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 214 (codified as amended in scattered sections of 42 U.S.C. (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq. (1988)); Fair Housing Act of 1968, Pub. L. No. 93-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 et seq. (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e(1988); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 et seq. (1988)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (to be codified at 42 U.S.C. § 3601 et seq.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.).

government posed by lily-white legislative delegations from racially diverse jurisdictions. The decision in this case and in its companion lawsuits from Texas and Louisiana stems from the lamentable blindness of the district courts to the latter danger.

Finally, in contemporary America, it may be impossible fairly to represent ostensibly "political" interests if ethnicity is ignored. In the real world race often serves as a shorthand or organizing principle for political communities of interest. Consider, for example, blacks in Marion County, Indiana. In *Whitcomb v. Chavis*, residents of inner-city Indianapolis challenged the state's use of multi-member state legislative districts, claiming that the scheme produced unconstitutional racial vote dilution. This Court disagreed: black voters lost not because they were *black*, but because they were *Democrats*: "The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." 403 U.S. at 151. In *Davis v. Bandemer*, black residents of inner-city Indianapolis again challenged the Indiana scheme and again lost because their overwhelming support of Democratic candidates showed that it was politics, not race, that caused their exclusion. 478 U.S. at 118 n. 8. But in response to a post-*Gingles* challenge under section 2 of the Voting Rights Act to the very districts upheld in *Davis*, the state agreed to abandon its multimember scheme and create several majority-black single-member districts. *See Dickinson v. Indiana State Election Bd.*, 817 F. Supp. 737 (S.D. Ind. 1992) (recounting the history of the section 2 litigation).

This overlapping of racial and political affiliations is a commonplace in contemporary politics. *See also LULAC v. Clements*, 999 F.2d 831, 850-55 (5th Cir) (en banc) (determining that black candidates for judicial office lost because they were Democrats, not because they were black),

cert. denied, 114 S Ct 878 (1994). The decision by the unsuccessful Republican plaintiffs in a political gerrymandering challenge to North Carolina's congressional reapportionment, *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) (three-judge court), *aff'd*, 113 S.Ct. 30 (1992), to recast themselves as plaintiff-intervenors in *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court), is another pointed illustration of this reality.

Given the intertwining of race and politics, an expansive rule that treats all race-conscious districting with suspicion raises serious questions of administrability. Suppose, for example, that Democrats had controlled the Indiana reapportionment process and that they had drawn districts that had advantaged Democrats, including the overwhelmingly black Democratic community of inner-city Indianapolis, and that white suburban Republicans challenged the plan. Would the level of judicial scrutiny depend on a federal court's ability to disentangle the political and racial aspects of the legislature's decision? Would plans that favor black Democrats be accorded more searching scrutiny than plans that advantaged white Democrats? Such as result would, we suggest in the next section, raise serious constitutional questions.

III. *Shaw v. Reno* Must Be Read Narrowly to Avoid Denying African Americans the Equal Protection of the Laws Guaranteed by the Fifth Amendment

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a provision of the Akron City Charter that provided that:

> "Any ordinance enacted by the Council of The City of Akron which regulates the use, sale,

> advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective."

Akron City Charter § 137. The Court explained that the fatal weakness in the ordinance was that it "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations" and those involved in "the pursuit of other ends." 393 U.S. at 390. The "reality" of such a provision, the Court explained, is that "the law's impact falls on the minority" because they are more likely to "benefit from laws barring racial, religious, or ancestral discriminations ...." *Id.* at 391. Section 137 involved impermissible discrimination on the basis of race, the Court concluded, because "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

Suppose a state were to pass a statute declaring that "any group of voters shall be entitled to petition the legislature to draw a congressional district in which members of the group form a majority of the electorate: *Provided*, That if the primary common characteristic of the group is the race or color of its members, the group shall be entitled to constitute the majority in a district only if it can persuade the legislature to draw a district with a dispersion score of .40 or

above or a perimeter score of .30 or above."[5] Such a statute would clearly run afoul of *Hunter*, because it would treat voters who politically affiliate along racial lines differently from voters who choose to affiliate along other shared characteristics, and would make it more difficult for them to secure favorable apportionment plans. And although the hypothetical statute might be race-neutral on its face, this Court would surely conclude that in reality it would burden black voters more heavily, since racial bloc voting and their shared interest in governmental policies to combat racial discrimination make them especially likely to seek race-conscious apportionments that provide them with majority-black districts. Such a hypothetical law, like the provision in *Hunter*, would make it more difficult for black voters than for other groups to enact favorable apportionment legislation, since it would constrain their available options in ways that other groups' options were not constrained.[6] To uphold such an ordinance would turn the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries.

If that hypothetical statute would violate the Fourteenth Amendment -- as clearly it would -- then a similar federal judicially created rule would also run afoul of the Constitution. Federal courts are bound by the equal protection component of the Due Process Clause of the Fifth

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[5] For descriptions of these technical terms for measuring compactness, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 553-56 (1993).

[6] Just as clearly, a statute that provided that "a majority-white district may be any shape but a majority-black district must be regular in its boundaries," would clearly violate the equal protection clause.

Amendment. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). Thus, the federal courts cannot place unique barrier in the path of black voters' seeking legislative plans of their choice.

If *Shaw* is read narrowly, it certainly does not conflict with the Fifth Amendment's guarantee of equal protection. Under such a reading, the Constitution simply requires heightened scrutiny for race-conscious districting when the outcome of the process is districts that are never drawn for other groups. But if *Shaw* is read broadly, as the courts below have shown themselves prone to do, such a reading poses serious equal protection problems. To render districts suspect when they are drawn at the behest of the black community -- when farmers, Republicans, incumbents, "North Louisiana English-Scotch-Irish," *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (three-judge court), *probable juris. noted*, Nos. 94-558 and 94-627, can obtain equivalently shaped districts -- poses precisely the equal protection threat identified in *Hunter*. This Court should make clear that black voters are entitled to an equal opportunity to participate in the redistricting process and to benefit from the kind of traditional districting practices, including the drawing of oddly shaped districts, that all other political groups enjoy.

CONCLUSION

The decision of the district court represents both an incorrect reading of this Court's opinion in *Shaw v. Reno* and an unwarranted federal judicial intrusion into the political process. Accordingly, this Court should reverse the judgment of the court below and remand the case with directions to dismiss the plaintiffs' complaint.

Respectfully submitted,

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Nos. 94-631, 94-797, and 94-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ZELL MILLER, *ET AL.*, *Appellants*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

LUCIOUS ABRAMS, JR., *ET AL.*, *Appellants*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF *AMICI CURIAE* OF THE STATES OF TEXAS, ET AL. IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. STANDING IS A CONSTITUTIONAL PREREQUISITE WHICH MUST BE ESTABLISHED THROUGH PROBATIVE EVIDENCE OF THE KINDS OF HARMS (INCREASED POLARIZED VOTING AND SELECTIVELY INDIFFERENT LEGISLATIVE REPRESENTATION) IDENTIFIED IN *SHAW* AND WHICH CANNOT BE PRESUMED MERELY FROM THE PRESENCE OF OFFENDED SENSIBILITIES. 5

II. THE LOWER COURTS' APPLICATIONS OF *SHAW V. RENO* UNDERMINE STATE PRIMACY IN REDISTRICTING, IGNORE POLITICAL REALITIES, AND REST ON THE UNACCEPTABLE PRINCIPLE THAT MINORITY VOTERS MUST ESCHEW POLITICAL GIVE AND TAKE IN WHICH ALL OTHER VOTERS PARTICIPATE 11

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page(s)
Allen v. Wright, 468 U.S. 737 (1984)	7,10
Baker v. Carr, 369 U.S. 186 (1962)	10
Board of Regents v. Roth, 408 U.S. 564 (1971)	16
Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989)	14
Davis v. Bandemer, 478 U.S. 109 (1986)	9
DeWitt v. Wilson, 856 F.Supp. 1409 (E.D.Cal. 1994)	13
Edelman v. Jordan, 415 U.S. 651 (1974)	7
Gaffney v. Cummings, 412 U.S. 735 (1973)	11
Gregory v. Ashcroft, 501 U.S. 452 (1991)	2
Growe v. Emison, 113 S.Ct. 1075 (1993)	16
Hays v. Louisiana, 862 F.Supp. 119 (W.D. La. 1994)	1
Johnson v. DeGrandy, 114 S.Ct. 2647 (1994)	14,15
Johnson v. Miller, 864 F.Supp. 1354 (S.D.Ga. 1994)	1,7
League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993)	13
Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992)	6,7,8,9

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 17

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,
113 S.Ct. 2297 (1993) 7

Palmore v. Sidoti, 466 U.S. 429 (1984) 17

Pleasant Grove, City of v. United States,
479 U.S. 462 (1987) 17

Regents of the University of California v. Bakke,
438 U.S. 265 (1978) 8

Richards v. Vera, No. 94-805 10

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 12

Shaw v. Barr, 113 S.Ct. 653 (1992) 6

Shaw v. Hunt, 861 F.Supp. 408 (E.D.N.C. 1994) 1,6

Shaw v. Reno, 113 S.Ct. 2816 (1993) ..... *passim*

Valley Forge Christian College v. Americans United,
454 U.S. 464 (1982) 7

Vera v. Richards,
861 F.Supp. 1304 (S.D. Tex. 1994) ..... *passim*

Voinovich v. Quilter, 113 S.Ct. 1149 (1993) 2

Whitcomb v. Chavis, 403 U.S. 124 (1971) 13

White v. Weiser, 412 U.S. 783 (1973) 17

Wood v. Broom, 287 U.S. 1 (1932) 16

Constitutional Provisions, Statutes and Rules

2 U.S.C. 2c 3

42 U.S.C. 1973c 3

Miscellaneous

Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup.Ct.Rev. 245 6

INTEREST OF *AMICI CURIAE* STATES

Amici states submit this brief for one basic purpose: to highlight the threat to state primacy in fundamental redistricting decisions raised by lower court interpretations of the Court's opinion in *Shaw v. Reno*, 113 S.Ct. 2816 (1993).

The decisions of the lower courts in this case out of Georgia, in *Hays v. Louisiana*, 862 F.Supp. 119 (W.D. La. 1994), probable jurisdiction noted (Nos. 94-558 and -627), and in *Vera v. Richards*, 861 F.Supp. 1304 (S.D. Tex. 1994), appeals docketed (Nos. 94-805, -806, and -988), draw largely identical conclusions from widely divergent factual settings.[1] Particularly disturbing in these conclusions is the denigration of state policy choices which are independent of race but made in the maelstrom of redistricting where, by dint of both federal law and unavoidable reality, race necessarily plays a role. As these rulings signify, lower courts read *Shaw* as laying down such broadly prohibitory constitutional rules that they are overlooking significant state interests having nothing to do with race and how those interests play out in quite different ways in the widely differing politics of the various states. The Court emphasized that *Shaw's* prohibition was intended to reach the "exceptional cases," 113 S.Ct. at 2826, yet wielding the *Shaw* sword to strike down state enactments has become commonplace. *Shaw* should be confined to its original narrow channel.

The force of the lower courts' predominant approach -- combining the most open-ended of standing requirements with the most confining reading of the role of traditional, long-employed state policy considerations[2] -- threatens to convert state legislatures into mere

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[1] *Shaw v. Hunt*, 861 F.Supp. 408 (E.D.N.C. 1994), appeal docketed (No. 94-923), while upholding the North Carolina congressional redistricting effort, disposed of the standing question in a troubling, expansive fashion, and adopted a disturbingly narrow view of non-racial redistricting rationales.

[2] There are inconsistencies, though, on such fundamental legal points as what counts as a traditional districting principle. *Compare Johnson v. Miller*, 864 F.Supp. at 1369 (listing "protecting incumbents" as a traditional districting principle) *with Vera v. Richards*, 861 F.Supp. at 1335-36, and *Hays v. Louisiana*, 862 F.Supp. at 123.

formalistic checkpoints on the way to rigid federal judicial control of redistricting and impermissibly to frustrate conscientious state legislators by confronting them with indecipherable and possibly conflicting federal judicial dictates. If the lower court decision here stands, the path to constitutional redistricting will have become so narrow and obscure that the only way to successfully navigate it is either by sheer, blind luck or with a guide -- a federal judicial panel -- holding what amounts to a secret map but refusing to reveal it until journey's end.

The Court's stated principles reject such an outcome. "[R]eapportionment is primarily the duty and responsibility of the State . . . rather than of a federal court." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993). Furthermore, such a result would be anathema to the kind of federalism the Court has discerned in our federal Constitution, a federalism which acknowledges the unique and specially protected position of the states in making choices going to the heart of representative government. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

The states have a strong interest in seeing that *their* elected policymakers choose the non-constitutional ideas -- the traditional districting principles -- which inform the configuration of districts whose voters will elect their representatives in the national Congress. Now, before a major new round of redistricting has begun and expectations have settled around lower court interpretations of *Shaw v. Reno*, is the time to insure the states retain the authority which some of the lower courts hearing *Shaw* claims have taken away: the ability (and federalism-based right) to comply with the dictates of the Voting Rights Act while simultaneously balancing and honoring a panoply of other legitimate state interests.

Almost all states must redistrict congressional seats following the decennial census and accompanying decennial reapportionment.[3]

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[3] At this point, seven states do not have this obligation because they are apportioned only one congressional representative. They are Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. Congressional District Atlas, 103rd

All states must perform this task consistently with federal constitutional law (one-person/one-vote, partisan gerrymandering, and intentional racial vote dilution, plus, now, whatever the *Shaw* principle imposes) and federal statutory law (section 2 of the Voting Rights Act for all states and section 5 of the Voting Rights Act for some states)[4] as well as with the constitutional and statutory law of the various states.

The increasing complexity of our society, the population growth which forces more populous congressional districts because of the fixed number of overall seats, and the indifference of technological developments in communications and transportation to old political alignments and subdivisions mean that the next round of redistricting will call for even more difficult judgments about how to handle the vast array of state-based, often idiosyncratic considerations falling outside firmly established federal mandates. Our interest here is to help insure that *Shaw v. Reno* will no longer be read by lower federal courts in a fashion that denigrates non-racial state policy choices.

Aspirations to color-blindness should not be permitted to foist upon the states a tone-deafness to either their own unique political concerns or the private racial discrimination which sometimes accretes through the private ballot to become a powerful bloc of political exclusion. The lower court's overly expansive reading of *Shaw's* doctrine threatens precisely such a result, displacing the finely-tuned political ears of the people's elected state representatives with the figurative tin ear of an unelected federal judiciary in a matter lying at the heart of state governance. The states do not want this to happen.

Congress of the United States, vol. 1 at v (U.S. Dept. of Commerce Feb. 1993). By federal statute, all congressional districts must be single-member. 2 U.S.C. 2c.

[4] All or parts of sixteen states are subject to the preclearance requirements of section 5 of the Voting Rights Act, 42 U.S.C. 1973c. 28 C.F.R. Part 51 App. (listing the states, 9 of which are covered in their entirety and 7 of which have only parts covered, and giving the dates on which coverage was formally announced).

SUMMARY OF ARGUMENT

Constitutional standing to raise a *Shaw* claim was not implicitly or explicitly determined in *Shaw v. Reno*. In fact, the court expressly reserved on this issue. The requirement that a *Shaw* plaintiff demonstrate some kind of concrete harm from the state action giving rise to a *Shaw* claim certainly has not been eliminated, nor, under the Court's Article III jurisprudence, could it be. The lower court's explicit determination in this case that the plaintiffs had not demonstrated any harm should suffice to dispose of the case.

Shaw did provide markers for what would constitute standing by identifying the harms that could arise from a *Shaw* claim. Demonstrable evidence of increased racial polarization as a result of the creation of a contorted minority opportunity district or of a narrowing of the polity to which the representative elected from a challenged district responds, to a racially dominant group only, might suffice to establish the kinds of harm sufficient to impart standing.

Shaw cannot be read to preclude minority voters from engaging in the rough and tumble of political activity typically associated with redistricting. Such a reading would run counter to the basic meaning of the very constitutional provision on which the decision rests, the Equal Protection Clause. Further, it would constitute its own kind of explicit racial classification, requiring minorities to abstain from electoral politics while permitting all others to participate.

Yet, the effect of the lower courts' reading of *Shaw* is precisely to inject such disequilibrium into American redistricting politics. In part because of the posture in which the original case arrived at the Court, with the bare bones complaint about race forming the focal point of the decision, the lower courts have developed a kind of myopia about these cases. They misguidedly by attribute to race the distortions of the districts under attack, ignoring the political realities: that state political actors massage district boundaries to embed non-racial state policies into the districts finally drawn. Such traditional districting principles include incumbent protection, preservation of core districts, grouping of communities of interest (to which the unelected may be blind), and a

host of other state-based traditions that are intimately bound up with the political, economic and social life of the state.

Ultimately, what is at work here is the denigration of the state's fundamental right to make non-racial policy choices in this area and the arrogation to federal courts of their own non-constitutional preferences about how sovereign states should establish the basic structures to elect their representatives. *Shaw* was not a signal for such a break with longstanding, basic doctrines of federalism. This should be the occasion for the Court to re-confine *Shaw* to its original narrow compass and make clear again what was said in the original decision: it reaches only the "exceptional cases." The cases before the Court now do not fit this description, and they should be held to fall outside *Shaw's* reach.

ARGUMENT

In the context of redistricting challenges, standing principles are being read too expansively and traditional districting principles too narrowly. Palpable reality -- in terms of both individualized, concrete harm on the standing front and a clear-eyed, commonsense acceptance of everyday political concerns on the traditional districting principle front -- is in danger of being cast aside in the wake of *Shaw v. Reno*. *Shaw* does not require, or even countenance, such departures, and the *amici* states urge the Court to reiterate reality's place in *Shaw* jurisprudence.

I. STANDING IS A CONSTITUTIONAL PREREQUISITE WHICH MUST BE ESTABLISHED THROUGH PROBATIVE EVIDENCE OF THE KINDS OF HARMS (INCREASED POLARIZED VOTING AND SELECTIVELY INDIFFERENT LEGISLATIVE REPRESENTATION) IDENTIFIED IN *SHAW* AND WHICH CANNOT BE PRESUMED MERELY FROM THE PRESENCE OF OFFENDED SENSIBILITIES.

Standing is a threshold issue of constitutional dimension. The Court should delineate the contours of standing to raise a *Shaw* claim in the setting of this case, which has been fully tried on the merits, and make clear that the standing requirements applicable in other contexts

are fully applicable to redistricting cases and racial discrimination claims involving them.

Shaw v. Reno did not treat the standing issue at all. While some have expressed consternation about this omission, *see* Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup.Ct.Rev. 245, 278 ("remarkable departure"), it is fully understandable in the specific context of the case as it came to the Court the first time. The lower court had dismissed the action for failure to state a claim. There was only a bare complaint, and the *Shaw* plaintiffs at that point had adduced no evidence on any issue, including any fact-specific issues of injury and causation of the type emphasized in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), as essential to the establishment of constitutional standing.

When the case came up on appeal from the district court's Rule 12(b)(6) dismissal, the Court expressly refused to note probable jurisdiction regarding a standing question proffered by the appellants.[5] Then, in its opinion, the Court explained that "[t]oday we hold *only* that appellants have stated a claim under the Equal Protection Clause . . ." 113 S.Ct. at 2832 (emphasis added). Whether the allegations of a complaint state a cause of action, and whether the particular plaintiffs making the allegations have standing to press the action, are entirely separate issues.

Despite the Court's refusal to reach the standing issue, the lower courts hearing *Shaw* claims have tended to find in the *Shaw* decision an implicit disposition of standing. *Shaw v. Hunt*, 861 F.Supp. at 427

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[5] *See* Jurisdictional Statement, No. 92-357, i ("Do white voters have standing to seek relief from congressional redistricting which was intended by both the state and federal defendants to result in the election of minority persons to Congress from two majority-minority districts?") In noting probable jurisdiction, the Court directed that "[a]rgument shall be limited to the following question:" "whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own." *Shaw v. Barr*, 113 S.Ct. 653 (1992).

(*Shaw* "implied a standing principle"), *Vera v. Richards*, 861 F.Supp. at 1331 n.38 (Court "inferentially decided they had constitutional standing"), *and Johnson v. Miller*, 864 F.Supp. at 1370 (*Shaw* "implicitly recognizes"). Even were such a ruling "implicit" in *Shaw* -- and it was not -- the Court has repeatedly emphasized that implicit pronouncements on constitutional issues -- and standing is just such an issue -- do not settle them. *Edelman v. Jordan*, 415 U,S. 651, 671 (1974). Thus, standing in cases raising *Shaw* claims remains an open issue.

The lower courts' misreading of *Shaw* on standing, unless corrected by the Court, would dramatically increase the exposure of states to redistricting challenges by plaintiffs not constitutionally entitled to bring such claims and correspondingly enmesh the federal courts even further in micromanaging the details of core state activities. It would fly in the face of this Court's admonition that federal judges do not have "an unconditional authority to determine the constitutionality of legislative or executive acts," but may only do so where the constitutional requirements of a "case or controversy," including the threshold requirement of standing, are met. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 471 (1982).

Shaw v. Reno does not necessitate the approach taken by the lower courts and, in fact, offers a roadmap for elucidation of a standing principle in these kinds of cases that is far more consistent with extant standing doctrine than the open-ended approach of the lower court in this case.[6] One of the three essential elements of the constitutional law of standing is that plaintiffs must establish "injury in fact," meaning that they must demonstrate some harm that is "concrete and particularized" instead of merely "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2130. Generalized grievances are insufficient for standing, and the mere claim of a right to a particular type of conduct falls short of constitutional minimums. *Allen v. Wright*, 468 U.S. 737 (1984). *Northeastern Florida Chapter of the Associated General*

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[6] The different considerations applicable to standing to raise a vote dilution claim are not discussed here because, as *Shaw* explained, the claim it recognizes is "analytically distinct" from a vote dilution claim. 113 S.Ct. at 2830.

Contractors of America v. City of Jacksonville, 113 S.Ct. 2297 (1993), explaining that the existence of higher hurdles, not the likelihood of achieving a particular goal, imparts standing in an equal protection case, does not alter *Lujan's* fundamental requirement of an injury in fact. Even under *Northeastern Florida*, the benefit sought to be attained still must be concrete (as were the sought-after municipal construction contracts there).[7]

In explaining the kinds of concrete harms that might be attributable to a *Shaw* claim, the Court pointed to the possibility that creation of the kind of minority opportunity district targeted by the *Shaw* plaintiffs might exacerbate racial division by increasing racial bloc voting. 113 S.Ct. at 2827. Also, as another potential harm, the Court posited that representatives elected from the targeted minority opportunity districts might ignore their polity as a whole while focusing nearly exclusive attention on the dominant minority group in the district. *Id.*

However, whether one of these distinctive harms has actually occurred and is caused by a disputed districting plan is, like every issue of injury in a standing case, a question of fact. In this setting, as in all other standing cases, the plaintiffs bear the burden of demonstrating with probative evidence that the requisite injury had been caused by the districting plan at issue.

> The party invoking federal jurisdiction bears the burden of establishing these elements . . . Since they are not mere pleading requirements but rather *an indispensable part of the plaintiff's case*, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of *evidence* required at the successive stages of litigation . . . [T]hose facts . . .

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[7] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), similarly requires a palpability in the goal which is sought to be attained. Once Allan Bakke could clear the challenged hurdles to admission, he wanted a medical education and degree. This concrete goal was essential to his standing. 438 U.S. at 280 n.14.

> must be "supported adequately by the *evidence* adduced at the trial . . . "

Lujan v. Defenders of Wildlife, 112 S.Ct. at 2136-37 (emphasis added; internal citations omitted).

The plaintiffs in this case appear to have offered no evidence going to these two types of harms that must be associated with a *Shaw* claim, and the lower court made no findings about the existence of such harms.[8] They thus have failed to establish the requisite injury in fact.

Shaw v. Reno could not have rested on any generalizations about injuries arising from the impact of irregularly shaped districts drawn with a race-consciousness. The kind of claim it recognized was, by the Court's own terms, new, rare, and exceptional. Until the instant case and the *Louisiana v. Hays* case, no case which had been tried on the merits involving a *Shaw* claim had made its way to the Court. The *Shaw* opinion even continues the emphasis that "racial bloc voting . . . never can be assumed, but specifically must be proved in each case," 113 S.Ct. at 2830, a proposition which necessarily carries with it the requirement that *increases* in bloc voting be proven.

Similarly, the Court has explained that evidence is required to establish that an elected official will fail to represent all of his or her constituents. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held:

> An individual who votes for a losing candidate is usually deemed . . . to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without *actual proof* to the contrary, that the candidate elected will entirely ignore the interests of those voters . . . [W]ithout *specific supporting evidence*, a court cannot presume . . . that those who are elected will disregard the . . . under-represented group.

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[8] These types of harms cannot be assumed; indeed there is evidence to the contrary in the Louisiana, Texas and Maryland cases. See Appendix A.

478 U.S. at 132 (emphasis added).

Other lower courts have suggested that "stigmatization" by a race-based redistricting plan might impart standing, a proposition embraced by some of the parties before this Court in other cases. *See, e.g., Richards v. Vera*, No. 94-805, Appellees' Motion to Affirm at 15. Yet, the Court in *Allen v. Wright*, 468 U.S. 737 (1984), rejected precisely such stigmatic harm as inadequate to establish standing. There, the Court stressed that stigmatic injury is never sufficient to support standing unless accompanied by proof of "some *concrete* interest with respect to which respondents are personally subject to discriminatory treatment. That interest must *independently* satisfy the causation requirement of standing doctrine." *Id.* at 757 n.22 (emphasis added). The same absence of concrete injury that was fatal to standing in *Allen* is fatal to the stigmatic injury claim in this case.

The lower court in this case did make an explicit finding relevant to the standing issue. It determined that the plaintiffs "suffered no individual harm [and that] the 1992 congressional redistricting plans had no adverse consequences for these white voters." 864 F.Supp. at 1370. The fact that the court then went on to find standing demonstrates the abandonment of standing principles for *Shaw v. Reno* claims. The Court has not countenanced such an abandonment and cannot do so without overruling, at a minimum, *Allen v. Wright*.

Offended sensibilities were not enough for standing in *Allen v. Wright*, and they are not enough for standing in cases such as this one. Furthermore, the harms the Court has identified as possibly associated with a *Shaw* claim are not to be presumed; they must be proven as part of the plaintiff's case on standing. That did not happen in this case, and it does not appear to have happened in the other *Shaw* cases now pending before the Court.

Until the decision in *Baker v. Carr*, 369 U.S. 186 (1962), just over thirty years ago, redistricting law fell largely outside federal jurisdiction for reasons of justiciability. Now, under the lower court's theory at any rate, we have moved to the point where there are virtually

no justiciability restraints in this arena even though standing doctrine is widely perceived to have moved onto a more restrictive constitutional path. This unjustified expansion of *Shaw v. Reno's* reach calls out for correction by the Court.

II. THE LOWER COURTS' APPLICATIONS OF *SHAW V. RENO* UNDERMINE STATE PRIMACY IN REDISTRICTING, IGNORE POLITICAL REALITIES, AND REST ON THE UNACCEPTABLE PRINCIPLE THAT MINORITY VOTERS MUST ESCHEW POLITICAL GIVE AND TAKE IN WHICH ALL OTHER VOTERS PARTICIPATE.

In *Shaw v. Reno*, the Court recognized a new, "analytically distinct" claim in the equal protection law of redistricting and voting rights.

> [R]edistricting legislation [is unconstitutional if it] is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.

113 S.Ct. at 2824.

But nothing in *Shaw* serves to undo the Court's longstanding acceptance of the quite obvious fact that politics in all its forms, both refined and raw, plays a central role in redistricting decisions. Labeling efforts to squeeze politics out of the redistricting process "politically mindless," the Court has noted the "impossible task of extirpating politics from what are the essentially political processes of the sovereign states." *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973):

> Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the *political decisions* necessary to formulate a plan or accept

> those made by reapportionment plaintiffs who may have *wholly different goals* from those embodied in the official plan. From the very outset, we recognized that the reapportionment task dealing as it must with fundamental "choices about the nature of representation," . . . is primarily a political and legislative process.

Gaffney, 412 U.S. at 749 (emphasis added; internal citations omitted).

Shaw's necessarily narrow frame of reference has had unfortunate consequences for the lower courts deciding cases in its wake. Confined as it was to the pleadings, virtually its only ingredient was race; the rich stew of trial that holds other ingredients -- an especially diverse mixture in redistricting cases -- had not yet begun to be prepared.

This confined focus of the *Shaw* opinion has induced a myopia in the lower courts. Wherever they look, they seem to see only race.[9] This reflects "a naive vision of politics," to use a phrase from *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 103 (1990) (Scalia, J. dissenting). More than race nearly always informs congressional (or, for that matter, any) redistricting. It is safe to observe that congressional districts never are drawn in a vacuum; potential candidates are evaluated and potential political repercussions are pored over regardless of whether a particular district is intended to be a minority opportunity district satisfying the commands of the Voting Rights Act or the redoubt of some important or long-powerful state political figure.

For this decade's round of redistricting, the technology for these kinds of evaluations, in the form of sophisticated computer systems, had evolved to become at least an order of magnitude more powerful than ever before and the raw information similarly more voluminous and

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[9] For example, highly integrated, single-county urban districts have been struck down, *see Vera v. Richards, supra*, in the face of *Shaw's* description of the archetype of a distorted district. Such a district, posited the Court, is one that includes "individuals who belong to the same race, but who are otherwise *widely separated by geographical and political boundaries*." 113 S.Ct. at 2827 (emphasis added).

more detailed. Population data, for example, was available down to the census block level for the first time, and there were 7 *million* such blocks. Congressional District Atlas, *supra* n.3, vol. 1 at v. The result of this technological evolution tended to be the same in the political redistricting world as biological evolution has in the natural one: increased complexity of organization.

Some of the information used in this decade's redistricting was racial in character. Compliance with sections 2 and 5 of the Voting Rights Act, not to mention the antidiscrimination principle of the Equal Protection Clause, required it. The census information on race also provided other useful insights about the consequences of drawing congressional district lines in one place or another, but only when used in combination with other data and the political knowledge peculiarly available to elected officials.[10]

It hardly follows from such uses, though, that race is the sole[11] or even dominant factor accounting for the ultimate shaping of any given district. It would be, to borrow a phrase from *Shaw*, an "exceptional case[]" in which this were so. Working from the tandem elements of a *Shaw* claim -- that the district shape be irregular (i.e., wildly inconsistent with traditional districting practices) and that the sole (or even dominant) reason for the irregularity be race -- it might be possible to arrive at an idea of an archetypal district which would require

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[10]For example, in regions where racial voting patterns tend to divide along partisan lines, useful information about the partisan tendencies of a particular area could be gleaned from a sophisticated reading of such census data to get a reading "on the basis of their politics rather than their race or ethnicity[,]" *Rutan*, 497 U.S. at 108 (J. Scalia, dissenting). The Court has seen such phenomena at work in electoral settings and even found it determinative as a non-racial explanation for questioned voting activity. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971). Lower courts have taken a similar tack in rejecting section 2 claims, finding partisan activity where plaintiffs assert racial patterns. *See, e.g., League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 878 (1994) (rejecting section 2 challenge to Texas judicial election system).

[11]In a California redistricting case, the court read *Shaw* as condemning redistricting based "solely" on race. *DeWitt v. Wilson*, 856 F.Supp. 1409, 1412 (E.D.Cal. 1994), appeal docketed (No. 94-275). But other lower courts, including the one here, expand the Court's language on this point. *See* 864 F.Supp. at 1373-74.

the state to satisfy the twin tests of compelling interest and narrow tailoring. If circumstances in the state, especially those surrounding the question of whether racial bloc voting persists, were such that reasonable legislators drawing district lines would not have concluded that section 2 of the Voting Rights Act required the creation of a minority opportunity district and that (for those covered) section 5 of the Voting Rights Act required the maintenance of such a district, and if they nonetheless drew such a district by meticulously searching for blocs of racial minorities to string together into a district without regard to state-based districting principles, then a *Shaw* claim could be made out.

In a less extreme scenario, it was not infrequent during the last round of redistricting that legislators preparing to redraw their state's congressional districts were confronted with circumstances indicating that failure to draw a minority district in a region of the state[12] would result in liability under section 2. Political reality suggests that they would hardly simply turn on the computer, find a concentration of minority voters sufficient to satisfy section 2's requirements,[13] and then draw the district lines in as neat a fashion as geography and the computer would permit. *That* would constitute making race the clearly dominant, if not sole, factor in the shape of a district, and *that* would probably constitute a *Shaw* violation, especially if the district were misshapen and there were an absence of meaningful communities of interest among the district's residents.

But *that* scenario is not what happens in the real world of political redistricting. Once it is determined that the Voting Rights Act is going to require the creation or maintenance of a minority opportunity

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[12]Despite the Court's having left open the question of whether the proper frame of reference in a statewide redistricting for a statewide body for evaluating the first *Gingles* factor (geographic compactness and sufficient minority population) is localized or statewide, *Johnson v. DeGrandy*, 114 S.Ct. 2647, 2662 (1994), legislatures as a practical matter tend to assess the question by region. It is noteworthy that the United States, which urged a statewide frame of reference, *id.*, is the principal enforcer of section 5 of the Voting Rights Act.

[13]A leading section 2 standard requires a threshold of 50% minority voting age population to create a minority opportunity district. *See Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989).

district, a host of other factors and players make their appearance. Those factors and players (for example, incumbent members of Congress, or their surrogates, from the affected region) begin to mold the districts as much as they can so that Voting Rights Act compliance can coexist with other political interests and redistricting principles. When the molding is complete, the likelihood is high that the neat lines of the initial conceptual minority district have been changed, even distorted, to accommodate other interests having nothing to do with race. A minority opportunity district, compliant with the Voting Rights Act and perforce drawn with some attention to race, will continue to exist but as part of the state's larger political, economic and social life. As long as the non-racial considerations affecting the ultimate boundary lines for such a minority opportunity district are reasonably related to the state's larger political, economic or social life and the purpose of redistricting, a *Shaw* claim should fail.

Assuming sections 2 and 5 of the Voting Rights Act themselves are constitutional (an unchallenged proposition in the *Shaw* cases to date), to hold otherwise, and constitutionally forbid politics-driven distortion of minority opportunity districts while permitting it for other districts, would create its own invidious racial classification. It would set up one rule for the creation of minority opportunity districts -- politics is forbidden and only purely racial considerations shall operate -- and quite another for non-minority (*i.e.*, white dominant) districts. In short, minorities would be forbidden to play non-racial politics that are fully available to everyone else. [14] Not only is such a result not required by the Equal Protection Clause; it runs directly counter to it. *Cf. DeGrandy*, 114 S.Ct. at 2661 ("minority voters are not immune from the obligation to pull, haul, and trade" in the political sphere).

The appropriate test of whether the factors driving the shapes of minority opportunity districts are reasonably related to the state's larger political economic or social life is keyed to the traditional districting

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[14] At least one of the lower courts hearing a *Shaw* claim insists on such a rule for minority opportunity districts. *Vera v. Richards*, 861 F.Supp. at 1343 (district "must have the *least possible amount of irregularity in shape*, making allowance for the traditional districting criteria") (emphasis added).

principles referenced in *Shaw*. Consistent with the longstanding doctrine that redistricting is primarily a state function, *see, e.g., Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993), state law and state tradition are the proper source for discerning traditional districting principles. Certainly, federal law is not the place to look. In *Wood v. Broom*, 287 U.S. 1, 7 (1932), the Court held that the 1929 federal reapportionment act for Congress *deliberately* omitted requirements of compactness and contiguity for congressional districts. These requirements never have been reinstated in federal law.

This, however, is a state-specific inquiry; just as the Court recognizes that different constitutional requirements flow from the states' different rules about property, *Board of Regents v. Roth*, 408 U.S. 564 (1971), so too must it recognize that different *Shaw* implications flow from the states' different traditions about redistricting. The specialized redistricting abstention doctrine applied in *Growe v. Emison* is implicit recognition of this proposition.

Some states have explicit congressional redistricting requirements. West Virginia, in article I, section 4, of its constitution requires compactness and contiguity. California, in article XXI, section 1, of its constitution requires "respect" for the "geographical integrity of any city, county, or city and county, or of any geographical region" to the extent possible without violating other standards. Some states, on the other hand, have no explicit constitutional or statutory redistricting requirements for congressional seats. Texas, for example, falls in this latter category.

To discern in any given case whether a state has distorted minority districts with an indifference to its traditional districting criteria, a court considering a *Shaw* claim must look to several potential sources. State constitutional and statutory law on the topic, state case law, prior redistricting and political history, and contemporaneously-created districts other than the one under challenge all must be evaluated. If a minority opportunity district is severely distorted (for example, far beyond the kind of hypothesized district that might satisfy the first *Gingles* threshold factor in a section 2 setting) and creeps in and

out of city boundaries,[15] while other contemporaneous *non*-minority districts in the state do not do so, then further inquiry may be warranted to determine whether other traditions -- *e.g.*, incumbent protection and preservation of the core of old districts, *White v. Weiser*, 412 U.S. 783, 791 (1973) -- explain the result.

The lower courts decisions to date in *Shaw* cases, however, fail to accord sufficient weight to the states' own legitimate traditions. By giving an unduly pinched reading to "traditional districting criteria," lower courts ignore the reality that these criteria spring from the states and their political, economic and social traditions, not from some free-floating federal ideal. The approach of the lower courts raises the concerns flagged by the plurality in *Moore v. City of East* Cleveland, 431 U.S. 494, 502 (1977) (Powell, J.) ("there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court").

If left unchecked, this unduly restrictive view -- constitutionally unwarranted and federalism-insensitive -- inevitably will create strong disincentives for state compliance with the Voting Rights Act. State legislators hardly are going to embrace the Voting Rights Act and willingly comply with section 2's strictures if they are being told by the federal courts that, in doing so, they must sacrifice a host of other perfectly legitimate objectives in a rippling effect across the state or region. The *Shaw* doctrine requires no such unraveling of states' rights or of the protections afforded minority voters by the Voting Rights Act. It does not require a state to choose between its own non-racial politics and a recognition, where the facts warrant it, of the need to account for the reality of private racial biases, *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), in the way it groups voters into districts to roughly counterbalance those biases.

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[15] Political subdivision boundaries themselves carry no imprimatur of purity. Section 5's preclearance requirement applies to changes in such boundaries precisely because they are subject to manipulation for racial ends. *See City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (upholding preclearance denial to annexation).

Shaw is not a license to lower courts to ignore legitimate state policy choices or to pick and choose among them according to what fits their judicial sensibilities. The states urge the Court to reinstate their primacy in the redistricting field, consistent with the longstanding principle the Court has embraced since redistricting became litigable in the federal courts.

CONCLUSION

For the foregoing reasons, the *amici curiae* states urge reversal of the decision of the court below.

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APPENDIX

Summary of Record Evidence In Redistricting Cases Showing Decreasing Racial Polarization in Minority Opportunity Districts

The facts, taken from the record in this and other cases, show that the creation of minority opportunity districts has not exacerbated racially polarized voting. To the contrary, expert evidence on racially polarized voting shows that white voting for minority candidates generally has *increased* in minority opportunity districts. For example, Districts 2 and 11 in Georgia became minority opportunity districts for the first time in 1992. From 1984 to 1990, only one percent of white voters in the precincts now within District 2 voted for black and hispanic candidates in statewide elections. The corresponding white vote for black and hispanic candidates in District 11 was only four percent. A dramatic increase in white voting for black and hispanic candidates occurred in 1992, simultaneously with the first campaigns in the new minority opportunity congressional districts. Twenty-nine percent of white voters in District 2 and 37 percent of white voters in District 11 voted for black and hispanic candidates in statewide elections in 1992.[1]

Evidence from other States shows that minority opportunity districts, including irregularly-shaped districts, have resulted in increased white support for minority candidates. In 1984, only 8 percent of white voters voted for the black candidate in the Democratic congressional primary in what is now Louisiana, District 2. In 1990, the first year as minority opportunity district, 44% of white voters voted for black candidates and in 1992 the white vote for black candidates rose to 74%. (Years between 1984 and 1990 did not involved any black vs. white congressional elections that could be included in the analysis). Louisiana's District 4 became a minority opportunity district in 1992. From 1986 to 1990, white voting for black congressional candidates in that District ranged from a low of 3% (3 elections) to a high of 22% (one election). In 1992, white voting for black candidates rose to 58%. Declaration of Richard Engstrom, July 20, 1994, Chart One, *Hays v. Louisiana.*

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[1] *See* DOJ Ex. 24, Report of Dr. Allan J. Lichtman, May 26, 1994, Tables 1-3.

In Texas, the chart below[2] reports pre-1992 and 1992 white voting for Black candidates in Texas' two African American opportunity districts (Districts 18 and 30) and for Hispanic candidates in Texas' seven Hispanic opportunity districts.

TEXAS POLARIZED VOTING
ELECTIONS HELD IN MAJORITY-MINORITY
CONGRESSIONAL DISTRICTS MINORITY VERSUS WHITE
ELECTIONS 1992 AND PRE-1992

	Minority Opportunity Districts								
	15	16	18	20	23	27	28	29	30
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES *									
1992 ELECTIONS	37%	33%	29%	25%	16%	50%	0%	5%	64%
PRE-1992 ELECTIONS	22%	30%	24%	6%	9%	27%	7%	5%	15%

* Results are averages for Statewide, Countywide and Legislative District elections held within the precincts of the minority opportunity districts. 1992 results for Districts 27, 28, and 30 are based on one election.

In both African American districts, white bloc voting *decreased* in 1992. This decrease in white bloc voting occurred even though District 18 was made more irregular by the 1991 redistricting and District 30 is admittedly irregular in shape (although no more irregular than majority-white districts in Texas). Significantly, District 30, the newly-created African American opportunity district

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[2] From information set out in State Ex. 14, Final Report of Dr. Alan J. Lichtman, App. 2 Tables 1-9, *Vera v. Richards*.

in Dallas, showed a large increase in white vote for black candidates, from only 15% of white voters in pre-1992 elections to 64% in 1992.

Texas' Hispanic opportunity districts show a consistent pattern, with substantial decreases in white bloc voting in 5 districts, no change in one district (29) and an increase in only one of seven districts (28). Significantly, the single district which showed an increase in white bloc voting, District 28, is not irregularly shaped and was found to meet constitutional requirements by the District Court in *Vera v. Richards*.

Maryland is also consistent. A new African American opportunity district, District 4, was created in the 1991 redistricting. White voting for black congressional candidates in Prince George's County, where both new District 4 and old District 5 were centered, increased from 0% in the 1990 Democratic primary to 44% in the 1992 Democratic primary. Plaintiff's Trial Ex. 22, Affidavit of Theodore S. Arrington, Sept. 6, 1993, Table 4, *NAACP v. Schaeffer*, 849 F. Supp. 1022 (D. Md. 1994).

TEXAS POLARIZED VOTING
ELECTIONS HELD IN MAJORITY-MINORITY
CONGRESSIONAL DISTRICTS 1992 AND PRE-1992

	DISTRICT								
	15	16	18	20	23	27	28	29	30
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES									
1992 ELECTIONS	37%	33%	29%	25%	16%	50%	0%	5%	64%
PRE-1992 ELECTIONS	22%	30%	24%	6%	9%	27%	7%	5%	15%

* 1992 RESULTS FOR DISTRICTS 27, 28, AND 30 ARE BASED ON ONE ELECTION.

SOURCE: FINAL REPORT OF DR. ALLAN J. LICHTMAN, APPENDIX 2, TABLES 1-9, AL VERA ET AL. V. ANN RICHARDS ET AL.

GEORGIA POLARIZED VOTING
ELECTIONS HELD IN SECOND AND ELEVENTH
CONGRESSIONAL DISTRICTS BLACK VERSUS WHITE
ELECTIONS 1992 AND PRE-1992*

	DISTRICT	
	2ND	11TH
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES *		
1992 ELECTIONS	29%	37%
PRE-1992 ELECTIONS	1%	4%

* RESULTS ARE AVERAGES FOR STATEWIDE ELECTIONS HELD WITHIN THE PRECINCTS OF THE SECOND AND ELEVENTH DISTRICTS, 1984-1990 AND 1992.

SOURCE: REPORT OF DR. ALLAN J. LICHTMAN, REPORT ON ISSUES RELATING TO GEORGIA CONGRESSIONAL DISTRICTS, MAY 26, 1994, TABLES 1-3, DAVIDA JOHNSON, ET AL. V. ZELL MILLER, ET AL.

LOUISIANA POLARIZED VOTING: 2ND AND 4TH CONGRESSIONAL DISTRICTS BLACK VERSUS WHITE CONGRESSIONAL ELECTIONS: 1984 TO 1992

SECOND DISTRICT: BECAME MAJORITY BLACK IN 1990 *

	1984 PRIMARY	1990 PRIMARY	1992 PRIMARY
% WHITE VOTE FOR BLACK CANDIDATES	8%	44%	74%

FOURTH DISTRICT: BECAME MAJORITY BLACK IN 1992 **

	1986 PRIM	1986 RUN	1988 PRIM	1988 RUN	1990 PRIM	1992 PRIM
% WHITE VOTE FOR BLACK CANDIDATES	3%	22%	3%	15%	3%	58%

* THERE WAS ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1984 PRIMARY; SIX BLACK CANDIDATES AND SIX WHITE CANDIDATES; AND TWO BLACK CANDIDATES AND ONE WHITE CANDIDATE IN THE 1992 PRIMARY. THE SECOND DISTRICT IS BASED IN NEW ORLEANS AND HAS CONSIDERABLE OVERLAP DURING THE PERIOD STUDIED HERE.

** THERE WAS ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1986 PRIMARY; ONE BLACK CANDIDATE AND ONE WHITE CANDIDATE IN THE 1986 RUNOFF; ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1988 PRIMARY; ONE BLACK CANDIDATE AND ONE WHITE CANDIDATE IN THE 1988 RUNOFF; ONE BLACK CANDIDATE AND TWO WHITE CANDIDATES IN THE 1990 PRIMARY; AND SIX BLACK

CANDIDATES AND TWO WHITE CANDIDATES IN THE 1992 PRIMARY. THE FOURTH DISTRICT IS BASED OUTSIDE OF NEW ORLEANS AND HAS LIMITED OVERLAP FOR THE PERIOD BEFORE AND AFTER THE 1992 REDISTRICTING.

SOURCE: DECLARATION OF RICHARD ENGSTROM, JULY 20, 1994, CHART ONE, RAY HAYS ET AL. V. STATE OF LOUISIANA, ET AL.

MARYLAND POLARIZED VOTING:
FIFTH AND FOURTH CONGRESSIONAL DISTRICTS:
BLACK VERSUS WHITE CONGRESSIONAL ELECTIONS
PRINCE GEORGE'S COUNTY 1990 & 1992

	ELECTION	
	1990 DEM. PRIMARY	1992 DEM. PRIMARY
% WHITE VOTE FOR BLACK CANDIDATES	0%	44%

* AFTER THE 1990 ELECTION, IN THE POST-1990 REDISTRICTING, THE FIFTH CONGRESSIONAL DISTRICT, BASED IN PRINCE GEORGE'S COUNTY WAS REDRAWN. A NEW MAJORITY BLACK DISTRICT, THE FOURTH CONGRESSIONAL DISTRICT, WAS CREATED THAT WAS LARGELY BASED IN PRINCE GEORGE'S COUNTY. IN THE 1990 DEMOCRATIC PRIMARY, BLACK CANDIDATE ABDUL MUHAMMAD RAN UNSUCCESSFULLY AGAINST INCUMBENT STENNY HOYER IN THE FIFTH DISTRICT. IN 1992, SEVERAL BLACK AND WHITE CANDIDATES RAN FOR THE DEMOCRATIC NOMINATION FOR THE OPEN SEAT IN THE FOURTH DISTRICT. ELECTION RESULTS FOR THE TWO YEARS ARE FOR PRINCE GEORGE'S COUNTY ONLY.

SOURCE: AFFIDAVIT OF THEODORE S. ARRINGTON, SEPTEMBER 6, 1993, TABLE 4, NAACP ET AL. V. WILLIAM DONALD SCHAEFER ET AL.

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Nos. 94-631, 94-797, 94-929

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZELL MILLER, ET AL.,
Appellants,
v.
DAVIDA JOHNSON, ET AL.,
Appellees.

UNITED STATES OF AMERICA,
Appellants,
v.
DAVIDA JOHNSON, ET AL.,
Appellees.

LUCIOUS ABRAMS, JR., ET AL.,
Appellants,
v.
DAVIDA JOHNSON, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BRIEF OF *AMICI CURIAE* Mexican American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Organization for Women, National Organization for Women Legal Defense Fund, National Urban League, People For The American Way, Women's Legal Defense Fund, IN SUPPORT OF APPELLANTS

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Mexican American Legal Defense and Educational Fund, the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, the National Organization for Women, the National Organization for Women Legal Defense Fund, the National Urban League, People For The American Way and Women's Legal Defense Fund, respectfully move the Court for leave to file the attached brief as *amici curiae* in support of the appellants. The appellants have consented to the filing of this brief. Appellees have refused to grant consent.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a nonprofit, national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, including *City of Lockhart v. United States,* 460 U.S. 125 (1983), *Garza v. County of Los Angeles,* 756 F. Supp. 1298 (C.D. Cal.), *aff'd,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991), and *Hastert v. State Bd. of Elections,* 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court).

The National Asian Pacific American Legal Consortium ("NAPALC") is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian and Pacific Americans through a national collaborative structure that pursues litigation, advocacy, education, and public policy development. The NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander populations: the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles). The enforcement of the Voting Rights Act as a means for providing Asian Pacific Americans with meaningful access to the electoral process is one of NAPALC's top priority programs.

The National Association for the Advancement of Colored People ("NAACP") is a private membership organization of 500,000 members nationwide. It is the nation's oldest and largest civil rights organization. The NAACP was active in the effort to win passage of the Voting Rights Act of 1965 and the subsequent amendments enacted thereto. The NAACP has frequently provided representation to minorities in voting rights cases and has participated in litigation before this Court, including *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166 (1985), and *Statewide Reapportionment Advisory Comm. v. Theodore,* 113 S. Ct. 2954 (1993).

The National Organization for Women ("NOW") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 600 chapters in all 50 states and the District of Columbia. NOW has, since its inception, advocated the full and complete political participation of all people, particularly women and racial and ethnic minorities. Specifically, NOW and NOW's political action committee has a project called "Elect Women For a Change," that supports the election of women to public office.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to secure equal rights and to eliminate sex-based discrimination. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major focus of NOW LDEF's work is to promote civil rights for women, including equal electoral participation.

The National Urban League ("League"), founded in 1910, is the premier social service and civil rights organization in America. The League is a nonprofit, nonpartisan community-based organization headquartered in New York City, with 113 affiliates in 34 states and the District of Columbia. The mission of the League is to assist African Americans in the achievement of social and economic equality. The League implements its mission through advocacy, bridge building, program services, and research.

People For The American Way ("People For") is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our Nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and its effects and to promote meaningful and effective voter participation by all citizens. These efforts have included conducting nationally recognized voter education and registration programs, participating in legislative advocacy on these issues, and serving as counsel or as *amicus curiae* in important cases before this Court and courts across the country.

The Women's Legal Defense Fund ("WLDF"), founded in 1971, is a national advocacy organization working at federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has long advocated broad application of the constitutional and statutory guarantees of civil rights under the law.

All of these organizations advocate on behalf of voters who are concerned with maintaining complete openness and diversity in the electoral process. The issue of how congressional boundaries are drawn affects them and their constituencies of minorities and women, and voters around the country.

The resolution of the issues in this case will have an impact on the interests of women and minority voters generally as well as on the particular parties before the Court. This amicus brief focuses on the issues before the Court in light of the historical development and expansion of the constitutional right to vote. *Amici* thus offer a broader perspective regarding the potential impact and importance of this case, as well as a more expansive analysis of the public policy issues in question, than that which is likely to be provided by the particular parties to this case. This brief therefore presents arguments that complement rather than duplicate those of the appellants.

Amici represent several broad-based constituencies who will be directly affected by the decision herein. *Amici* also

offer arguments and analysis complementary to the briefs filed by Appellants. *Amici* therefore respectfully request that the motion be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

INTRODUCTION 5

I. Amendments to the Constitution Have Resulted in an Increasingly Diverse and Representative Electorate 6

II. The Voting Rights Act and its Amendments Demonstrate the Commitment of Congress to Enforcing the Constitutional Guarantee of Equal Political Opportunity 13

III. The History of Voting Rights Litigation in the Supreme Court Shows the Court's Commitment to Expanding the Right to Vote 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: Page

Allen v. State Board of Elections, 393 U.S. 544 (1969) . 23, 24

Baker v. Carr, 369 U.S. 186 (1962) 9, 26

Breedlove v. Suttle, 302 U.S. 277 (1937)..... 12

Brown v. Board of Education, 347 U.S. 483 (1954)..... 2

Cady v. State, 31 S.E. 2d 38 (Ga.), *cert. denied,* 323 U.S. 676 (1944) 12

Castro v. State of California, 466 P.2d 244 (Cal. 1970) ... 19

Chisom v. Roemer, 501 U.S. 380 (1991)..... 24

City of Mobile v. Bolden, 446 U.S. 55 (1980) 22, 23

Clark v. Roemer, 500 U.S. 646 (1991) 24

Fortson v. Dorsey, 379 U.S. 433 (1965) 23

Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal.), *aff'd,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991)..... 18, 19, 20

Georgia v. United States, 411 U.S. 526 (1973)..... 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 9, 26

Gong Lum v. Rice, 275 U.S. 78 (1927) 10

Gray v. Sanders, 372 U.S. 368 (1963)..... 9, 26, 27

Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971)..... 20

Guinn v. United States, 238 U.S. 347 (1915) 25

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).....2, 28

Hawthorne v. Turkey Creek School District, 134 S.E. 103 (Ga. 1926)..... 12

Hirabayashi v. United States, 320 U.S. 81 (1943) 21

Houston Lawyers' Association v. Attorney General, 501 U.S. 419 (1991) 24

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) 24

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League of United Latin American Citizens v. Midland Independent School District, 812 F.2d 1494 (5th Cir.), *vacated on other grounds en banc*, 829 F.2d 546 (5th Cir. 1987) 18

Louisiana v. Hayes, No. 94-627 (probable jurisdiction noted and appeal pending) 4

Loving v. Virginia, 388 U.S. 1 (1967) 10

Naim v. Naim, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955) 10

NAACP v. Hampton County Elections Commission, 470 U.S. 166 (1985) 23

Oregon v. Mitchell, 400 U.S. 112 (1970) 28, 29

Pleasant Grove v. United States, 479 U.S. 462 (1987) 24

Plessy v. Ferguson, 163 U.S. 537 (1896) 10

Powers v. State, 157 S.E. 195 (Ga. 1931) 12

Prewitt v. Wilson, 46 S.W.2d 90 (Ky. Ct. App. 1932) 14

Reynolds v. Sims, 377 U.S. 533 (1964) 9, 13, 28

Shaw v. Reno, 113 S. Ct. 2816 (1993) ..... *passim*

Smith v. Allwright, 321 U.S. 649 (1944) 25, 26

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 14, 15

Stephens v. Ball Ground School District, 113 S.E. 85 (Ga. 1922) 12

Takao Ozawa v. United States, 260 U.S. 173 (1922) 21

Terry v. Adams, 345 U.S. 461 (1953) 26

Thornburg v. Gingles, 478 U.S. 30 (1986) 23, 24

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

United States v. Hayes, No. 94-558 (probable jurisdiction noted and appeal pending) 4

Wesberry v. Sanders, 376 U.S. 1 (1964) 3, 7, 27, 28

Westminster School District v. Mendez, 161 F.2d 774 (9th Cir. 1947) 10

White v. Regester, 412 U.S. 755 (1973) 16

Yick Wo v. Hopkins, 118 U.S. 356 (1896) 2

Constitution and Statutes:

United States Constitution:

Article I 7

Thirteenth Amendment 8

Fourteenth Amendment ..... *passim*

Fifteenth Amendment 9, 10, 11, 13, 25

Seventeenth Amendment 11

Nineteenth Amendment 11, 12

Twenty-Fourth Amendment 12

Twenty-Sixth Amendment 12, 13

Statutes:

National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg-1 et seq. (1994)) 13

The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 et seq. (1994)) ..... *passim*

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TABLE OF AUTHORITIES—*(Continued)*

Statutes: Page

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Eugene Rostow, *The Japanese-American Cases — A Disaster,* 54 Yale L.J. 489 (1945)..... 21

The Voting Rights Act Extension, H. Rep. No. 196, 94th Cong., 1st Sess. 16, 94th Cong., 1st Sess. 24 1975 ... 17, 18, 20

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Miscellaneous: Page

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J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions, in* Controversies in Minority Voting 135 (Bernard Grofman & R. Chandler Davidson eds., 1992) 10

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TABLE OF AUTHORITIES—*(Continued)*

Miscellaneous: Page

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZELL MILLER, ET AL.,

Appellants,

v.

DAVIDA JOHNSON, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellants,

v.

DAVIDA JOHNSON, ET AL.,

Appellees.

LUCIOUS ABRAMS, JR., ET AL.,

Appellants,

v.

DAVIDA JOHNSON, ET AL.,

Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

INTEREST OF AMICI

Amici, Mexican American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Organization for Women, National Organization for Women Legal Defense Fund, National Urban League, People for the American Way and Women's Legal Defense Fund have extensive experience in advocacy on voting rights issues and/or in voting rights litigation, and share the goal of preventing any retrenchment by the Courts and Con-

gress of statutes and decisional law which have expanded the right to vote and resulted in the creation of a more inclusive democracy.[1]

SUMMARY OF ARGUMENT

Since *Brown v. Board of Education,* 347 U.S. 483 (1954), the country has made steady progress in eliminating the effects of its unfortunate history of segregation and discrimination against African Americans. As a result of the enactment and enforcement of the Voting Rights Act of 1965[2] and the amendments to the statute, the longstanding exclusion of minority groups from a voice in governance has begun to change. In the last decade, the perception of the United States as a country governed only by whites (or Anglos) has begun to change. This change in the perception and the reality has provided an avenue of hope for Americans of all colors and backgrounds, and has fostered a sense of inclusion and participation that for so long was nonexistent.

The steady progress which this country has made in expanding the franchise is threatened by the litigation resulting from this Court's decision in *Shaw v. Reno,* 113 S. Ct. 2816 (1993). Through its history our nation has demonstrated an interest in expanding the franchise and fostering participation by different parts of society. The decisions of the courts below and other cases signal a retrenchment which should be avoided. *Amici* urge this Court, when ruling on the merits of these appeals, to consider this case in its historical and legal context.

The Supreme Court has recognized that "the political franchise of voting is a 'fundamental political right, because [it is] preservative of *all* rights.' " *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 667 (1966); *see also Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1896) (recognizing that the right to vote "is preservative of all rights"). Nevertheless, for many years after

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1. Each organization is described fully in the preceding Motion for Leave to File, which is incorporated by reference herein.

2. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 et seq. (1994)).

the founding of this nation, the fundamental right to vote was denied to all except white male property owners.

The nation continues to make its gradual advance toward the achievement of a universal right to suffrage for all adult citizens of the United States, without regard to wealth, race, previous condition of servitude, color, gender, national origin, language minority status, or age. As a result, the "fundamental political right" to vote is no longer the province of a small minority of the citizenry. Rather, it is a right enjoyed and cherished by millions of Americans whose lives are affected by the decisions made by their elected representatives.

Amici are committed to ensuring that the right to vote and to participate equally in the electoral process receive this Court's most esteemed recognition, fervent protection and reaffirmation. These appeals, which arise from a decision invalidating one of the districts of the post-1990 Census congressional redistricting plan for the state of Georgia (the Eleventh Congressional District, currently represented by Congresswoman Cynthia McKinney), present issues of great concern to *Amici* and their members and constituents, all of whom are concerned with ensuring that constitutional and statutory provisions prohibiting race-, gender-, wealth-, English literacy- and age-based restrictions upon the right to vote are fully enforced.

Amici believe that the right to equal participation in the election of members of the United States Congress is among the most cherished rights of citizens of the United States. Justice Hugo Black wrote that the "Constitution's plain objective of making equal representation for equal numbers of people [was] the fundamental goal for the House of Representatives . . . [and] the high standard of justice and common sense which the Founders set for us." *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964).

Constitutional amendments and congressional enactments since the Civil War have expanded the right of suffrage, consistent with this "plain objective" of the United States Constitution. Racial, ethnic and language minorities and women in America continue to suffer discrimination in employment, housing and other circumstances, despite the progress which

has been made. Amendments to the Constitution, coupled with federal legislation, have been instrumental to the efforts to remedy the effects of discrimination against minorities and women.

The vitality of both the constitutional amendments extending the franchise, as well as the body of laws enacted by Congress to enforce these amendments, are at issue in the appeals now before the Court. *Amici* join the Appellants in urging the Court to reverse the decision below, which seriously conflicts with the fundamental message of the numerous decisions of this Court recognizing the importance of the right to vote. These decisions, acknowledging the damaging and persistent effects of the varied means of disenfranchising large segments of the citizenry of the United States, and remedying the impact of decades of exclusion from the political process that is the legacy of many members of the modern electorate, should not be disturbed.

Our society and the federal courts, including the United States Supreme Court, have struggled in this era with the appropriate limits on explicit consideration of race, national origin and sex. It is important to recognize that congressional enactments such as the Voting Rights Act represent a significant and proper balancing of the interests and concerns at stake.

Amici urge the Court to maintain that balance and to reject the unwarranted expansion and misreading of *Shaw* that has spawned these appeals, and similar lawsuits,[3] against post-1990 Congressional and state legislative districts. It would be a national tragedy if *Shaw* was interpreted and followed with finality in such a manner that it would adversely and unnecessarily cause a sudden and drastic reduction of African American and other minority citizens' political participation and representation at this critical time in this still-evolving history of our democracy. This country's commitment to democracy, plu-

3. *See, e.g., United States v. Hays,* No. 94-558 (prob. jur. noted and appeal pending); *Louisiana v. Hays,* No. 94-627 (prob. jur. noted and appeal pending).

ralism and diversity, which insures and safeguards the rights of all of our citizens to equal participation in our electoral process, requires no less.

ARGUMENT

INTRODUCTION

Appellees are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District who have successfully challenged Georgia's 1990 congressional redistricting on constitutional grounds. Appellees alleged in their complaint that the configuration of the Eleventh Congressional District amounted to unconstitutional racial gerrymandering in violation of *Shaw*.

A majority of the district court held that Georgia's Eleventh Congressional District violated the Equal Protection Clause of the Fourteenth Amendment and permanently enjoined further elections in the district. *Amici* urge this Court to review constitutional history, the legislative history of the Voting Rights Act of 1965 (the "Act") and the case law interpreting the Act as it considers the questions presented in these appeals. *Shaw* acknowledges that race-conscious redistricting may violate the rights of white citizens under some circumstances. But *Shaw* does not require the result reached in the court below. *Amici* urge reversal of the decision below. Constitutional history, legislative history of the Act and its amendments, and the case law interpreting the Act reveal an overall benefit to all citizens — both whites and members of minority groups — when expansions of the right to vote are undertaken. The actions of the State of Georgia and the United States Attorney General are legal and constitutional, and the Eleventh Congressional District should be preserved.

Appellees below have failed to prove any harm suffered by them. They have also failed to prove that Georgia's Eleventh Congressional District is so bizarre or irrational on its face that the only conclusion that could be reached by the Court is that it was created solely on the basis of race. *Amici* urge the Court to resist this attempt to expand the reach of *Shaw*. Some gradual progress has been made in opening up

the American political system to minorities and women. Any retraction of this progress will have a deleterious effect on the political process and the political landscape.

The central underpinning of a free and democratic system of government is the right to vote. The struggle to guarantee that every citizen has an equal voice in government has long commanded the attention and the emotions of this Nation. The expansion of the right to vote is a sign of — and ensures the promotion of — the vitality of democracy in the United States. Dr. Martin Luther King, Jr., once said:

> Give us the ballot, and we will no longer have to worry the federal government about our basic rights. . . . Give us the ballot and we will fill our legislative halls with men of good will. . . . Give us the ballot and we will help bring this nation to a new society based on justice and dedication to peace.[4]

In his remarks, Dr. King asserted that the protection, availability and opportunity to use the franchise guarantees the integrity of the political process and strengthens the society served by that process.

Efforts to ensure that the right to vote is one available to all have been accomplished on several different levels. Through constitutional amendments, through legislative enactments and through the courts, our system has continually protected and broadened this fundamental right.

I. AMENDMENTS TO THE CONSTITUTION HAVE RESULTED IN AN INCREASINGLY DIVERSE AND REPRESENTATIVE ELECTORATE

The nation's interest in promoting participation in the political process is evident in the expanding protections of the right to vote in our Constitution. In its original form, the Constitution recognized this right. Several amendments to it have expanded this right to all persons: first to African Americans,

4. Quoted in Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1082 n.14 (1991).

next to women, and later to those between the ages of 18 and 21. The Constitution and its amendments demonstrate the vital national interest in promoting the participation and involvement of all segments of our population in the electoral process.

Article I, Section 2 of the Constitution provides that members of the United States House of Representatives shall be chosen "by the People of the several States" and shall "be apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2. In his majority opinion in *Wesberry v. Sanders,* 376 U.S. 1, Justice Black reviewed the debate among the delegates of the Constitutional Convention over whether election should be by the people. According to Justice Black, "[o]ne principle was uppermost in the minds of many delegates: that . . . 'equal numbers of people ought to have an equal number of representatives. . . .' " *Id.* at 10-11 (citation omitted).

African Americans were regarded as property for taxation purposes, and as such, were not allowed to share in having this equal voice, this immutable right. The drafters of the Constitution, in fact, agreed that each slave would be counted as three-fifths of a free person. For the first two hundred and fifty years after America was colonized, most African Americans were enslaved and unable to vote. No woman of any color, race or national origin could vote. By the eve of the Civil War, African Americans, whether "free" or not, were denied the suffrage in most States.[5]

Nevertheless, what can only be described as a deep-rooted drive for equality in this country persisted. The Constitution had recognized and embodied the "ancient 'right of the people to participate in their legislative

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5. African Americans were denied the franchise everywhere except New York and the New England states (excluding Connecticut where they were denied the right to vote). Moreover, in New York, African Americans, but not whites, were required to have $250 worth of property to vote. Chandler Davidson, *The Voting Rights Act: A Brief History, in* Controversies in Minority Voting 7 (Bernard Grofman & Chandler Davidson eds., 1992).

council.'" This, in turn, had been recognized as deriving from "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" in the Declaration and Resolves of the First Continental Congress of October 14, 1774.[6] In several of the amendments that followed, the movement toward universal suffrage, a natural extension of the idea of equality, would be advanced. Gradually the right to vote was extended beyond educated, wealthy, white, male citizens who owned property.

The right of universal suffrage rose to the forefront of the American political agenda during the Civil War, and thereafter. The enactment of various amendments enlarging the reach of the franchise reflected this country's commitment to its original promise of equality under law for all its citizens regardless of race, color or heritage.

The Thirteenth Amendment formally abolished the institution of slavery. U.S. Const. amend. XIII. This amendment began the process of curing the single greatest failure of the Constitution of 1787, assuring all Americans, including African Americans, a semblance of citizenship.

The drafters of the Fourteenth Amendment in Section 2 addressed the issue of the right of suffrage by penalizing States that deny voting rights.[7] In Section 1, although not explicitly mentioning race, all citizens are guaranteed their 'privileges and immunities', in addition to the equal protection and due process of the laws. Minorities were now provided with a sword with which they would battle the historical vestiges of discrimination. The battle, however, was yet to come.[8]

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6. *See* George Anastaplo, *Amendments to the Constitution of the United States: A Commentary,* 23 Loy. U. Chi. L.J. 631, 833 (1992).

7. U.S. Const. amend. XIV, § 2. It is no secret that this part of the Amendment was overlooked as the franchise for African Americans was eroded some years later. Davidson, *supra* note 4, at 9.

8. With respect to right of suffrage, the Fourteenth Amendment did not serve as a source of authority until the early vote dilution cases. *See, e.g.,*

The Fifteenth Amendment was enacted by Congress in 1870, less than a year after ratification of the Fourteenth Amendment and was directed toward the immediate goal of securing and protecting minority voting rights. It provided, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude. The Congress shall have the power to enforce this by appropriate legislation." U.S. Const. amend. XV. Despite the clear language of this provision, contrivances by southern States, along with often violent white southern resistance to African American suffrage, created the need for further congressional action to fully enforce its guarantees.[9]

Congress made repeated attempts to protect the right of suffrage of African Americans, principally in the Military Reconstruction Acts, the various enforcement acts, Ku Klux Klan acts (to execute the dictates of the Fourteenth and Fifteenth Amendments) and the 1875 Civil Rights Act. But white southern intransigence proved to be a powerful force. African American political power, albeit in its nascency, was suffocated by a variety of means, from the insidious voting fraud and use of gerrymandering and at-large elections with white only primaries, to outright statutory suffrage restrictions, replacement of local elections with appointments and, of course, with intimidation and violence.[10]

Gray v. Sanders, 372 U.S. 368 (1963) (Equal Protection Clause requires that, once a geographical unit for which a representative is to be chosen is designated, all who participate in the election must have an equal vote regardless of race or sex); *Baker v. Carr,* 369 U.S. 186 (1962); *Reynolds v. Sims,* 377 U.S. 533 (1964); *see also Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (Whittaker, J., concurring) (noting that the Fourteenth Amendment, in addition to the Fifteenth Amendment, might provide a source of authority in voting rights cases).

9. Ratification of the Fifteenth Amendment did not alter the exclusion of women of color from the United States' electorate. The right to vote was not extended to women until 50 years later, with the ratification of the Nineteenth Amendment.

10. For a detailed analysis of the legal and extralegal means by which

Most African Americans effectively lost the right to vote by the end of the nineteenth century. Voters enfranchised during Reconstruction were purged from the rolls. The nation lapsed back into pre-abolition times. African American children were consigned to a separate and often tangibly inferior education. The separate but equal doctrine served to justify further institutional racism, supported and enforced through governmental action. Nationwide, enforced separation in public accommodations and most aspects of social life was common.[11] All this persisted despite the guarantee of racially impartial suffrage set forth in the Fifteenth Amendment, and the guarantee of equal protection under law provided for in the Fourteenth Amendment.

Just as the door was closing on the struggle for African American suffrage, the drive for women's suffrage was gaining momentum. The Civil War Amendments clearly served as an example and defined the objective

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NOTES *(Continued)*

African American political power was diluted and African Americans were disenfranchised after the Reconstruction era, *see* J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions, in* Controversies in Minority Voting 135 (Bernard Grofman & Chandler Davidson eds., 1992).

11. *See generally Plessy v. Ferguson,* 163 U.S. 537 (1896). African Americans were not the only minority group subjected to such state-enforced segregation. Virginia's anti-miscegenation statute, invalidated by this Court in *Loving v. Virginia,* 388 U.S. 1 (1967) was also applied to sanction a Chinese man and white woman who married in North Carolina and returned to Virginia to live. *See Naim v. Naim,* 87 S.E. 2d 749 (Va.), *vacated,* 350 U.S. 891 (1955). The law made "any white person and colored person . . . [leaving the] State, for the purpose of being married . . . with the intention of returning . . . [and] cohabiting as man and wife" subject to one to five years imprisonment, if convicted. *Loving,* 388 U.S. at 4-5. Asian- and Mexican American children, like African American children, were required to attend segregated schools for a substantial part of this century. *See, e.g., Gong Lum v. Rice,* 275 U.S. 78 (1927) (holding that exclusion of child of Chinese ancestry from white schools was constitutionally permissible); *Westminster Sch. Dist. v. Mendez,* 161 F.2d 774 (9th Cir. 1947) (challenging segregation of Mexican-American children in public school system).

for the movement to amend the Constitution to eliminate gender-based restrictions on the right to vote.[12]

The next series of voting rights related amendments, the Seventeenth and Nineteenth Amendments, were enacted during the Progressive era in the first quarter of this century. The latter had a goal patently similar to that of the Fifteenth Amendment — expanding the franchise, in this case to include women. The former's extension of popular election for Senators was another important milestone in the development of the right to vote. [13]

The Nineteenth Amendment, echoing the simple text of the Fifteenth Amendment, provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX, § 1. The Nineteenth Amendment, as in every other amendment of significance to the right to vote, including the Fourteenth, the Fifteenth, the Twenty-Fourth and the Twenty-Sixth, includes a provision granting Congress the power "to enforce this article by appropriate legislation." *See, e.g.*, U.S. Const. amend. XIX, § 2.

With the enactment of the Nineteenth Amendment, the movement toward universal suffrage in the United States made further strides. The inclusion of women, who once were excluded from the political process purely on the basis of sex, was a watershed event in American history. Women's suffrage and the ratification of the Nineteenth Amendment continued the process of actualization of the principle of equality upon which the nation was founded.[14]

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12. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments,* 103 Yale L.J. 1971, 1980 (1994).

13. The Seventeenth Amendment provides that: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." U.S. Const. amend. XVII.

14. In some parts of the country, women, like the emancipated African

The movement toward universal suffrage continued with the Twenty-Fourth and Twenty-Sixth Amendments. The Twenty-Fourth Amendment disallowed the use of a poll tax as a means of withholding the right to vote in presidential and congressional elections.[15] The Twenty-

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NOTES *(Continued)*

American males who preceded them in suffrage, found that even an unambiguous constitutional amendment could not ensure full incorporation into political life. In Georgia, for example, ballots cast by newly enfranchised women voters were targeted in disqualification petitions. *See, e.g., Hawthorne v. Turkey Creek Sch. Dist.,* 134 S.E. 103 (Ga. 1926); *Stephens v. Ball Ground Sch. Dist.,* 113 S.E. 85 (Ga. 1922). Within one year after the ratification of the Nineteenth Amendment, the Georgia legislature enacted laws extending the poll tax (which was originally enacted after the ratification of the Fifteenth Amendment) to women registrants. *Hawthorne,* 134 S.E. at 106-07. The poll tax applied somewhat differently to women than to men, however. Women, unlike men, were relieved of the obligation of paying any tax (at the rate of one dollar per year) for years after they became legally eligible to register (i.e., age 21) but declined to do so. Nolen R. Breedlove, a 28 year old white man who was unable to demonstrate that he had paid poll taxes during the seven years in which he was legally eligible to register, was not allowed to register to vote after refusing to pay his "back" poll taxes. *Breedlove v. Suttle,* 302 U.S. 277, 280 (1937). Breedlove challenged the denial of registration on the ground that it violated the Nineteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. This Court rejected Breedlove's arguments, holding that "women may be exempted [from payment of accrued poll taxes] on the basis of . . . [the] burdens necessarily borne by them for the preservation of the race," and because "[t]he laws of Georgia declare the husband to be the head of the family and the wife subject to him. . . . [Therefore, t]o subject her to the levy would be to add to his burden." *Id.* at 282.

In the year after the ratification of the Nineteenth Amendment, the Georgia legislature also passed a law which provided "that 'females' shall not be liable to discharge any military, jury, police, patrol or road duty.'" *Powers v. State,* 157 S.E. 195 (Ga. 1931). The Georgia Supreme Court held that this law was "not obnoxious to the Nineteenth Amendment," *id.,* and reaffirmed the *Powers* holding more than a decade later in *Cady v. State,* 31 S.E. 2d 38, 42 (Ga.), *cert. denied,* 323 U.S. 676 (1944).

Finally, Georgia was not among the states responsible for the ratification of the Nineteenth Amendment in 1920. In fact, the Georgia Legislature did not ratify the amendment until *February 20, 1970.* U.S. Const., amend. XIX (West U.S.C.A. 1987) at 983.

15. U.S. Const. amend. XXIV, § 1.

Fourth Amendment, "testifies to the now prevalent opinion that financial considerations or economic interests should not bear upon one's eligibility or power to vote."[16]

The Twenty-Sixth Amendment provides, "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI. This most recent amendment to the Constitution removed yet another great barrier to participation in the political process. The inclusion of younger people contributed immensely to the further expansion of the franchise.

This history of amendments to the Constitution reveals the devotion to expansion and broadening of the right to vote for all Americans. This history also provides a framework for the following discussion of congressional enactments to enforce these constitutional guarantees, and the decisions of this Court that have reaffirmed them.

II. THE VOTING RIGHTS ACT AND ITS AMENDMENTS DEMONSTRATE THE COMMITMENT OF CONGRESS TO ENFORCING THE CONSTITUTIONAL GUARANTEE OF EQUAL POLITICAL OPPORTUNITY

In *Reynolds v. Sims*, this Court recognized that "to the extent . . . a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. One year after *Reynolds* was decided, Congress exercised its power under Section 2 of the Fifteenth Amendment to pass the Voting Rights Act of 1965. An analysis of the legislative history of the Act provides further evidence of the importance of inclusiveness as a fundamental principle of a fair and democratic government.

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16. Anastaplo, *supra* note 6, at 836. *See also* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg-1 et seq. (1994)) (enhancing access to voter registration and providing, *inter alia*, for voter registration to be conducted at public assistance agencies).

President Lyndon Johnson's comments upon signing the Act into law reveal the aspirations of those who fought for the Act's passage:

> The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.[17]

The Act represented a major contribution to the promotion of fairness and participation in the political process by a coordinate branch of government.

In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), the Court upheld the constitutionality of the Act. Under the Act, literacy tests were suspended in states which had a history of discrimination in voting.[18] The Court upheld this provision of the Act, explaining that the Act employed this remedy in

> response [to] the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about 'dilution' of their electorates through the registration of Negro illiterates. Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.

Id. at 334.

At the conclusion of its opinion in *Katzenbach*, the Court stated that the Act is "a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of

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17. Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 at 3-4 (1976) (quoting President Lyndon B. Johnson).

18. While the use of literacy tests as a device for disenfranchising racial and language minorities is well known, in at least one state an attempt was made to invalidate ballots cast by women — but not men — on the ground of illiteracy. *See Prewitt v. Wilson,* 46 S.W.2d 90 (Ky. Ct. App. 1932). The court labelled the disqualification effort "specious" and held that "male voters [we]re not required to meet the same test . . . [so] it is therefore discriminatory against [women]." *Id.* at 92.

non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live." *Id.* at 337.

Since its enactment in 1965, the Act has been amended four times. Each set of amendments reflects the inexorable movement toward a more inclusive broad-based democracy. The first set of amendments, enacted as the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (1994)), broadened the franchise by expanding the Act's coverage to include many jurisdictions, especially those outside the deep South, that were exempt from the Act as originally enacted. The amendments also expanded the franchise by granting eighteen-year-old citizens the right to vote. *Id.* The desire for full inclusion of all American citizens in the political process was at the core of Congress' decision to amend the Act. Senator Barry Goldwater, one of the sponsors of the 1970 amendments, testified:

> Being members of the same political community, it is my view that all citizens possess the same inherent right to have a voice in the selection of the leaders who will guide their government.

Amendments to the Voting Rights Act of 1965: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 91st Cong., 2d Sess. 282 (1970) (statement of Hon. Barry Goldwater). The statement of Attorney General John N. Mitchell also illustrates the spirit underlying the hearings:

> The right of each citizen to participate in the electoral process is fundamental in our system of Government. If that system is to function honestly, there must be no arbitrary or discriminatory denial of the voting franchise. . . . We have come to the conclusion that voting rights is . . . a national concern for every American. . . . Our commitment must be to offer as many of our citizens as possible the opportunity to express their views at the polls on the issues and candidates of the day.

Id. at 182-83 (statement of Hon. John N. Mitchell).

White v. Regester, 412 U.S. 755 (1973), unanimously held that multimember state House of Representative districts in two Texas counties violated the constitutional rights of African Americans and Mexican Americans, in violation of the Fifteenth Amendment to the Constitution, by "cancel[ling] out or minimiz[ing] the[ir] voting strength," *Id.* at 765. This Court specifically noted the district court's findings that despite the substantial African American population in Dallas, "since Reconstruction . . . there ha[d] been only two Negroes in the Dallas County delegation to the Texas House of Representatives;" that a "white-dominated organization" in Dallas County controlled Democratic Party candidate slating; and that "racial campaign tactics . . . [targeting white voters were used] to defeat candidates who had the overwhelming support of the black community." *Id.* at 766-67.

Similarly, this Court noted in *White* that San Antonio's Hispanic community, "along with other Mexican-Americans in Texas, had long suffered from, and continue[d] to suffer from, the results and effect of invidious discrimination and treatment in the fields of education, employment, economics, health . . . [and] politics." *Id.* at 768. The Court also noted that although Mexican-Americans comprised nearly 30 percent of the total population of the county, "only five Mexican-Americans since 1880 ha[d] served in the Texas legislature from Bexar County." *Id.* at 768-79. These factors, among others, influenced this Court's decision to affirm the district court's holding that "the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political liege, specifically in the election of the representative to the Texas House of Representatives." *Id.* at 769. In response to these circumstances, "[s]ingle-member districts were . . . required to remedy the effects of past and present discrimination against Mexican-Americans' . . . and bring the community into the full stream of political life of the county and State." *Id.*

Two years after the *White* decision, "the minority language provisions were added to the Act upon determination by the Congress that 'voting discrimination against [language

minority] citizens ... is pervasive and national in scope.'" Congress found that because of the denial of equal educational opportunities by State and local governments, language minorities experienced severe disabilities and illiteracy in the English language that, together with English-only elections, excluded them from participation in the electoral process.[19]

The legislative history accompanying the language minority provisions added to the Voting Rights Act in 1975 (42 U.S.C. §1973b(f)(1)) documents a pattern of discrimination against language minorities which has interfered with their exercise of the fundamental right to vote. *See, e.g.*, Voting Rights Act Extension, H. Rep. No. 196, 94th Cong., 1st Sess. 1975; Voting Rights Act of 1965 — Extension, S. Rep. No. 295, 94th Cong, 1st Sess. 1975, *reprinted in* 1975 U.S.C.C.A.N. 774. Congress found that "[l]anguage minorities, like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation." H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) at 16-17.

Congress recognized that by broadening the prohibition of "discriminatory tests or devices" so as to preclude English-only ballots, non-English-speaking citizens were more likely to realize a meaningful franchise. *Id.* As in 1965 and 1970, broadening the franchise was, again, at the core of the debate:

> In the quest for the right to vote, Spanish-speaking citizens have had many experiences which were similar to those of blacks. It is time for the nation to end discrimination which is based on national origin. Just as the Voting Rights Act has brought about progress among blacks and whites in the South, it can be an instrument of progress for all people in those areas where there are Spanish-speaking communities.

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19. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 77 (1981), *quoting United States Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, Extension of the Voting Rights Act of 1965: Hearings on S.407, S.903, S.1509, and S.1443*, 94th Cong., 1st Sess. (1975).

Hearings on the Voting Rights Act Amendments Before the Subcommittee on Civil and Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess. 64 (1975) (testimony of Hon. Andrew Young).

Some of the barriers to political participation that language minorities have faced are identical to those used to impede African American voter participation and dilute African American voting strength. They include imposition of the poll tax, erection of barriers to voter registration by hostile election officials, and the manipulation of election district boundaries to dilute political support for their preferred candidates and ensure control of elections by white voting blocs. H. Rep. No. 196, 94th Cong., 1st Sess. (1975), at 16-20; S. Rep. No. 295, 94th Cong., 1st Sess. (1975), at 26; *see also* H. Rep. No. 94-196 at 22 (noting federal court finding that state of Texas has "a history pockmarked by a pattern of racial discrimination that has stunted the electoral and economic participation of the black and brown communities in the life of the state"). More recently, the United States Court of Appeals for the Fifth Circuit, in *League of United Latin American Citizens v. Midland Independent Sch. Dist.,* 812 F.2d 1494 (5th Cir.), *vacated on other grounds en banc,* 829 F.2d 546 (5th Cir. 1987), recognized that African American and Hispanic Texans "share[d] common experiences in past discriminatory practices." *Id.* at 1500.

At the beginning of this decade, a federal court found that Los Angeles, California's Hispanic community "has borne the effects of a history of discrimination in the areas of education, housing, employment, and other socioeconomic areas." *Garza v. County of Los Angeles,* 756 F. Supp. 1298, 1339-40 (C.D. Cal.), *aff'd,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991). For a decade "in the aftermath of the Depression, some 200,000 to 300,000 Mexican-Americans returned to their 'country of origin a part of a program instituted by the Justice Department. . . . [M]any legal resident aliens and American citizens of Mexican descent were [thereby] forced or coerced out of the county.' " *Id.* The court noted that Mexican-Americans in Los Angeles were blatantly

discriminated against in public accommodations and education throughout the first half of this century:

> School officials required Mexican children to have separate graduation ceremonies from Anglos attending the same school. . . . California maintained segregated schools for Hispanics in Los Angeles until 1947 when the California Supreme Court struck down such segregation. . . . However, . . . schools desegregation litigation involving [Los Angeles County school] districts . . . continued until 1989. . . . [I]t was common during the first decade of this century, for access to public swimming pools to be restricted for Mexican-Americans and blacks, usually to the day before the pool was to be cleaned.

Id. at 1340. It was not until 1970 that the California Supreme Court invalidated a California constitutional provision "conditioning the right of persons otherwise qualified to vote upon the ability to read the English language." *Id.* (citing *Castro v. State of California,* 466 P.2d 244 (Cal. 1970)).

The *Garza* court also found that Esteban Torres a Hispanic candidate for the United States House of Representatives, "encountered racial appeals by his opponents in the form of statements that Mr. Torres catered only to Hispanics and in the use of his photograph in opponents' campaign literature." *Id.* at 1331, 1341. In Torres' race, like all but a handful of the elections analyzed by plaintiffs' experts, non-Hispanic voters overwhelmingly rejected the Hispanic candidate. *Id.* at 1336-37.

Since the extension of the Act in 1975 to cover language minorities, the number of Hispanic elected officials has increased dramatically. In 1973, the six states with the largest Hispanic populations had 1,280 Hispanic elected officials. Twenty years later this number had jumped to 3,999.[20]

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20. 1993 National Roster of Hispanic Elected Officials at vii (1993) (Table 18: Hispanic Elected Officials by Selected States, 1984-1993). Pre-1980 data is available only for the following six states: Arizona, California, Florida, New Mexico, New York, and Texas. Nationwide data is available starting in 1984. In that year the total number of Hispanic elected officials was 3,128; in 1993 it was 4,420. This number excludes 750 local school coun-

Unquestionably, the creation of districts which afford Hispanic voters a realistic opportunity to elect candidates of their choice has contributed to these gains. Since the extension of the Act, the Hispanic population has also achieved substantial gains in its participation in the political process. The number of Hispanic registered voters nearly doubled from 1972 to 1988, increasing from 2.495 million to 4.573 million.[21] This increased registration manifested itself in higher Hispanic voter turnout, as well.[22] Despite these gains, although Hispanics constitute nine percent of the total population of the United States, they account for only slightly more than one percent of the publicly-elected officials in the nation.[23] The work started by the passage of the Act is not yet complete. The result herein must not create an environment in which the progress which has been made will be reversed.

The experience of Asian Americans in many respects parallels the experience of Mexican Americans described by the *Garza* court. "[U]ntil 1947, a California statute authorized local school districts to maintain separate schools for children of Asian descent." S. Rep. No. 295, 94th Cong., 1st Sess. (1975) at 28 (citing *Guey Heung Lee v. Johnson,* 404 U.S. 1215

NOTES *(Continued)*

cil members in the Chicago area, positions which were not included in the 1984 count.

21. The Southwest Voter Registration Education Project, Legacy: 1974-1990, at 2. During this period the number of Hispanic registered voters increased by 83 percent. This number's true significance becomes apparent only after comparable rates are considered for other segments of the population. From 1972 to 1988 the number of white registered voters increased by 17 percent and that of African Americans by only 44 percent. *Id.*

22. For five southwestern states (Arizona, California, Colorado, New Mexico and Texas), votes cast by Hispanics increased 60.9 percent, from 1.016 million in 1976 to 1.634 million in 1988. Legacy, *supra* note 21, at 2. Comparison data is available for the period 1984 to 1988. During this time Hispanic turnout increased 20 percent; for the nation as a whole, it increased 0.3 percent. *Id.*

23. 5,170 Hispanics (including the Chicago school officials) held publicly-elected offices in 1993, as compared to 504,404 publicly-elected offices nationwide (1.0 percent). 1993 National Roster of Hispanic Elected Officials at viii.

(1971)). Hostility toward Asian immigrants led to strict regulation of entry to the United States and bans on naturalization. Persons of Japanese ancestry were once completely denied the opportunity to become naturalized citizens. *Takao Ozawa v. United States,* 260 U.S. 173 (1922). "Filipinos, who were subjects of the United States . . . [were nevertheless] ineligible for citizenship unless they served three years in the U.S. Navy. . . . [and] Chinese immigrants were not allowed to gain citizenship until 1943."[24] Japanese Americans were removed from their homes and confined to internment camps during World War II. *See Hirabayashi v. United States,* 320 U.S. 81 (1943); *Korematsu v. United States,* 323 U.S. 214 (1944).[25] Regrettably, as Congress noted in the legislative history accompanying the 1975 amendments to the Act, "[d]iscrimination against Asian Americans is a well-known and sordid part of our history." S. Rep. No. 94-295 at 28 n.21.

Limited English proficiency has remained a serious barrier to effective political participation for many Asian-Americans in the United States. *See The Voting Rights Act Language Assistance Amendments of 1992,* S. Rep. No. 315, at 5-6, 102d Cong., 2d Sess. (1992). Although Asian-Americans comprise almost 10% of California's population, only one Asian American, elected in 1992, is serving in the California state legislature. And in New York City, which has an Asian-American population of over 512,000, no Asian-American has ever been elected to the New York City Council or the New York state legislature. *See* U.S. Civil Rights Comm'n, Civil Rights Issues Facing Asian Americans in the 1990s 157 (1992).

The most recent amendments to the Act were passed with broad bipartisan support in August 1992, affecting over 200,000 Asian Americans with limited English proficiency across the nation. The Voting Rights Language Assistance Act of 1992 expanded the minority language requirements of Section 203 of the Act, 42 U.S.C. §1973aa-1a, to require multilin-

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24. Karen McGill Arrington, *The Struggle to Gain the Right to Vote: 1787-1965,* in Voting Rights in America: Continuing the Quest for Full Participation (Karen McGill Arrington and William L. Taylor, eds., 1992) at 34.

25. *See also* Eugene Rostow, *The Japanese-American Cases — A Disaster, 54 Yale L.J. 489 (1945).*

gual voting materials and assistance in jurisdictions with at least 10,000 voting age citizens of a single language minority group. Voting Rights Act Amendments of 1992, § 2, Pub. L. No. 102-344, 106 Stat. 921 (codified as amended at 42 U.S.C. § 1973aa-1a (1994)). These amendments enable the Asian American community to participate more effectively in the political process.

The 1982 amendments to the Act, promulgated shortly after (and in response to) this Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55 (1980), reflect Congress' continued determination to refine the Act so as to expand and amplify the right to vote and, thereby, prevent vote dilution. In 1982, Congress rejected an intent-based standard in favor of a test that focused on the "effect" of a challenged practice. Voting Rights Act Amendments of 1982, S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in,* 1982 U.S.C.C.A.N. 177, 191. Thus, these amendments fostered access to the political process by, *inter alia,* prohibiting voting practices that "result[] in a denial or abridgment of the right . . . to vote." Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a)). These amendments were enacted to redress the more subtle forms of discrimination that had emerged during the seventeen year period since the Act was first passed.

The Senate Report accompanying the 1982 amendments reveals that, no less than in 1965, expanding the franchise remains inextricably intertwined with Congress' intent to ensure electoral equality in an inclusive democracy:

> The Committee bill will extend the essential protection of the historic Voting Rights Act. It will insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future.
>
> Seventeen years ago, Americans of all races and creeds joined to persuade the Nation to confront its conscience and fulfill the guarantee of the Constitution. . . .
>
> As a result of the Voting Rights Act of 1965, hundreds of

> thousands of Americans can now vote and, equally important, *have their vote count as fully* as do the votes of their fellow citizens.

See S. Rep. No. 417, 97th Cong., 2d Sess. (1982), at 214.

On June 29, 1982, President Reagan signed the Voting Rights Act Amendments of 1982 into law, announcing: "As I've said before, the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[26]

In the almost thirty years since the enactment of the Act, the Court has generally endorsed its application and extension. In 1969, the Court held that minority citizens could assert a claim for "vote dilution" under the Act. *Allen v. State Board of Elections,* 393 U.S. 544, 569 (1969) (at-large or multimember elections could nullify minority voters' "ability to elect the candidate of their choice just as would prohibiting some of them from voting.").[27] It therefore gave a broad reading to the preclearance provisions of Section 5 of the Act.[28]

In 1986, the Court upheld the constitutionality of the 1982 amendments to the Act and eased the evidentiary requirements for asserting a claim of minority vote dilution by eliminating the requirement of proof of discriminatory intent. *Thornburg v. Gingles,* 478 U.S. 30 (1986).

In subsequent decisions, the Court approved expanding the application of Section 5's preclearance requirement and invigorated the remedy available to enforce Section 5. The Court held that Section 5 covered municipal annexation deci-

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26. White House Press Release (June 29, 1982).

27. *Cf. Fortson v. Dorsey,* 379 U.S. 433, 439 (1965) (multimember districting plan that "designedly or otherwise, ... operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population" would violate the Equal Protection Clause); *Mobile,* 446 U.S. at 126 ("The Court has long understood that the right to vote encompasses protection against vote dilution. '[T]he right to have one's vote counted' is of the same importance as 'the right to put a ballot in a box.' ") (Marshall, J. dissenting).

28. *See also NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 175-76 (1985); *Georgia v. United States,* 411 U.S. 526 (1973) (holding that Section 5 must be liberally construed to effectuate its remedial purpose).

sions motivated by an improper purpose. *Pleasant Grove v. United States,* 479 U.S. 462 (1987). It then held that a district court has the authority to enjoin elections if the challenged voting statutes have not been precleared under Section 5. *Clark v. Roemer,* 500 U.S. 646 (1991).

The Court recently extended the reach of Section 2 to elected state judiciaries, stating that the Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer,* 501 U.S. 380, 403 (1991) (quoting *Allen,* 393 U.S. at 567); *see also Houston Lawyers' Ass'n v. Attorney General,* 501 U.S. 419 (1991).

Finally, last term in *Johnson v. DeGrandy,* 114 S. Ct. 2647 (1994), the Court reaffirmed the *Gingles* framework for analyzing Section 2 claims and noted that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." *Id.* at 2661.

Amendments to the Act have resulted in a dramatic increase in the numbers of African American and Hispanic officials across the country. These minority groups have also greatly increased their participation in the political process. The Act, as amended, has contributed greatly to making the constitutional guarantees of the right to vote meaningful for the nation's racial, ethnic, and language minority citizens. The decision below jeopardizes the benefits to minority citizens, and indeed to the entire body politic, that have resulted from the vigorous enforcement of the Act. *Amici* therefore urge the Court to reverse the decision below.

III. THE HISTORY OF VOTING RIGHTS LITIGATION IN THE SUPREME COURT SHOWS THE COURT'S COMMITMENT TO EXPANDING THE RIGHT TO VOTE

The history of Supreme Court case law of voting rights can be divided into three phases. In the first phase, from early in the twentieth century until 1960, the Court invalidated discriminatory measures designed to prevent minorities from vot-

ing. During the second phase, which began in 1960 and lasted until 1966, the Court promoted the idea of one-person, one-vote. This phase coincided with the Court's continued efforts to remove obstacles intended to prevent minorities from voting. In the third phase, which began in 1966 (as discussed in Section II), the Court upheld the constitutionality of the Act, and expanded the application of the Act to promote the efficacy and fairness of the political process.

As early as 1915, the Court invalidated an Oklahoma statute that included a grandfather clause excusing whites from taking the state's literacy test. *Guinn v. United States,* 238 U.S. 347 (1915). Although the statute did not mention race, it included an exception for persons able to vote on January 1, 1866 — before the adoption of the Fourteenth and Fifteenth Amendments. The Court nullified the statute even though it imposed the literacy test in a superficially neutral manner. *Id.* at 364-65.

The white primary represented another discriminatory measure employed by the white majority in the South to exclude minorities from the political process. The Court considered numerous challenges to the white primary in Texas before finally declaring the practice unconstitutional in *Smith v. Allwright,* 321 U.S. 649 (1944).

In *Smith,* the Court held that Texas statutes excluding African-Americans from voting in a Democratic primary to select nominees for a general election violated the Fifteenth Amendment. The Court explained, "it may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race." *Id.* at 661-62 (citations omitted).

Texas argued that participation in the primaries was determined by private organizations rather than the State, and that the Constitution did not reach the conduct of those organizations. The *Smith* decision demonstrates the Court's com-

mitment to preserving the integrity of the democratic process by assuring equal electoral opportunity for all:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664.

Fort Bend County in Texas was undeterred by this admonition. In that county, an association that dominated the Democratic Party employed a white "pre-primary." The Court invalidated this practice in *Terry v. Adams,* 345 U.S. 461 (1953), explaining that "the effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids — strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens." *Id.* at 469-70.

In *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), the Court held that an Act of the Alabama Legislature changing the boundaries of the City of Tuskegee was unconstitutional because the Act eliminated nearly all of its African American voters from the City without eliminating any white voters. Shortly after *Gomillion,* the Court confronted the question of whether to review political measures that did not exclude minorities from the political process but instead diluted the value of their votes.

The seminal case, *Baker v. Carr,* 369 U.S. 186 (1962), held that the question of whether reapportionment in Tennessee — which legislators refused to do in a manner corresponding to actual population concentrations — presented a justiciable case. *Id.* at 209.

Georgia's county unit system as a basis for counting votes was the subject of a constitutional challenge in *Gray v. Sanders,* 372 U.S. 368. Under the county unit system, the vote of

each citizen in Georgia counted for less as the population of the county increased. "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Id.* at 379.

Because the county unit system diluted the vote of some state residents, the Court upheld the district court decision enjoining the use of the county unit system. The Court explained:

> The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro; none could successfully contend that discrimination was allowable. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. . . . The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.

Id. at 379-81 (citations omitted).

Subsequently, another Georgia electoral practice was the subject of *Wesberry v. Sanders,* 376 U.S. 1, in which the Court held that the State's failure to align its congressional districts in a way that reflected the population violated the Constitution. Under the 1931 Georgia Apportionment Statute, one Congressman represented "two times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts." *Id.* at 7.

Wesberry may be viewed as a companion case to *Reynolds v. Sims,* 377 U.S. 533, in which the Court articulated the one-person, one-vote standard that is the foundation of voting rights jurisprudence. In *Reynolds,* the Court held that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a state regardless of their residence. Discussing the right to vote, the Court stated:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... [H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as wholly prohibiting the free exercise of the franchise.

Id. 554-55 (citations omitted).

At the same time this Court established the one-person, one-vote principle, it continued to review the political process to remove barriers impeding participation in the process. In *Harper v. Virginia Board of Elections,* 383 U.S. 663, the Court held that a poll tax is unconstitutional because it conditions the right to vote on the payment of a fee and therefore violates the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

The Supreme Court upheld Congress' decision to enfranchise 18-year old citizens in national elections. *Oregon v. Mitchell,* 400 U.S. 112 (1970). In the same case, the Court

upheld Congress's prohibition of using literacy tests to discriminate against voters on account of their race in both state and federal elections.[29]

These cases represent a vision of inclusiveness and an expansion of the right to the franchise to young people, women, language minorities and other people of color, that has been nurtured and made explicit by this Court. The broad and expansive view of *Shaw v. Reno* urged by Appellees herein will have the effect of retrenching and retracting rights which are firmly established in the case law of this Court. For these reasons, the decision below should be reversed.

CONCLUSION

This Court has been instrumental in giving life to a vision of an America that is diverse and inclusive. In a representative democracy, legislative bodies must be elected with input from all segments of the citizenry to be — in fact and perception — genuinely representative. The decisions of this Court and the Laws enacted by Congress (such as the Voting Rights Act), which implement the constitutional guarantees of the right to equal political participation, have consistently reinforced this principle.

The Voting Rights Act of 1965, as amended, ensures that racial and language minority voters are afforded the same opportunity as white citizens to participate in the political process and elect candidates of their choice. The terrible legacy of governmentally-enforced exclusion of these groups from full political participation has necessitated reliance on measures, including majority-minority electoral districts, which mitigate the deleterious, continuing effects of such exclusion and counteract the persistent phenomenon of racially polarized voting.

As a result of such measures, racial and language minorities in many parts of the country, including Georgia, now

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29. Discussing the right to vote, Justice Douglas stated: "the right to vote is a civil right deeply embedded in the Constitution. . . . Voting concerns 'political' matters; but the right is not 'political' in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the court; and the claim has always been upheld as justiciable." *Mitchell*, 400 U.S. at 138-39 (citation omitted).

enjoy unprecedented opportunities to participate fully in the electoral process and have an equal opportunity to elect candidates of their choice to office. Thus, elected bodies, including the United States Congress, have begun to reflect the diversity of backgrounds, perspectives, interests and values of the nation as a whole, rather than a select subset of the population. This promotes the legitimacy of our political process and ensures that the interests of *all* citizens are considered and protected.

The modest gains which have been made in the American political landscape by minorities and women are fragile and should not be dismantled. At this critical point in American history, thirty years after initial passage of the Voting Rights Act and seventy-five years after the enfranchisement of women, *Amici* urge this Court to continue its legacy of vigorously protecting the voting rights of all citizens and fully enforcing the constitutional and statutory provisions that have outlawed discriminatory barriers to full political participation by racial, ethnic and language minority citizens and women in the political process. The decision below should be reversed.

Respectfully submitted,

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Nos. 94-631, 94-797, 94-929

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ZELL MILLER, *et al.*,
Appellants,

and

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,

and

UNITED STATES OF AMERICA,
Appellant,

v.

DAVIDA JOHNSON, *et al.*
Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVE GARY A. FRANKS, AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Amici will address the following questions:

I. Whether Appellees have sufficiently demonstrated standing to challenge Georgia's congressional redistricting plan by introducing evidence that they are Georgia voters and that the plan cannot be understood as anything other than an effort to classify and separate voters by race.

II. Whether "strict scrutiny" judicial review should be applied to a congressional district which was drawn so as to classify and separate voters by race and which is unexplainable in nonracial terms, regardless of the shape of the district.

III. Whether Appellants have demonstrated that in drawing the 11th Congressional District along racial lines, Georgia was serving a compelling state interest in a narrowly tailored manner.

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. APPELLEES HAVE STANDING TO PURSUE THEIR EQUAL PROTECTION CLAIMS 7

II. STRICT SCRUTINY IS WARRANTED WHENEVER RACE WAS THE OVERRIDING PREDOMINANT FORCE DETERMINING THE LINES OF A CONGRESSIONAL DISTRICT 10

A. A Bizarrely-Shaped District Is Not a Necessary Pre-Condition to a Racial Gerrymandering Claim Under Shaw . . . 11

B. The District Court's Standard Will Not Subject Every Redistricting Effort to Exacting Judicial Review 14

III. THE ELEVENTH CONGRESSIONAL DISTRICT CANNOT WITHSTAND STRICT SCRUTINY 18

A. The District Court Properly Declined to Apply the "Strong Basis in Evidence" Standard 18

B. The Eleventh District Is Not Narrowly Tailored to Furthering a Compelling Interest in Complying with the Voting Rights Act 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Allen v. Wright, 468 U.S. 737 (1984) 7

Beer v. United States, 425 U.S. 130 (1976) . . . 22, 24

City of Mobile v. Bolden, 446 U.S. 55 (1980) . 15, 23

City of Richmond v. J.A. Croson Co.
488 U.S. 469 (1989) 10, 19-21

Edmonson v. Leesville Concrete Co.,
111 S. Ct. 2077 (1991) 9

Georgia v. McCollum, 112 S. Ct. 2348 (1992) 9

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 9

Hirabayashi v. United States,
320 U.S. 81 (1943) 10

Martin v. Wilks, 490 U.S. 755 (1989) 24

New York v. United States, ___ F. Supp.
___, 1994 WL 744179 (D.D.C. 1994) 23

Palmore v. Sidoti, 466 U.S. 429 (1984) 17

Personnel Manager of Massachusetts
v. Feeney, 442 U.S. 256 (1979) 15

Powers v. Ohio, 111 S. Ct. 1364 (1991) 9

Regents of University of California
v. Bakke, 438 U.S. 265 (1978) 10

Shaw v. Reno, 113 S. Ct. 2816 (1993) . . . . . *passim*

Page

United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982), *affirmed as modified*, 727 F.2d 560 (6th Cir. 1984), *cert. denied*, 469 U.S. 821 (1985) 17

United States v. Yonkers Board of Education, 837 F.2d 1181 (2d Cir. 1987) 17

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 13

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11, 19-20

Statutes and Miscellaneous:

U.S. Const., 14th amend. (Equal Protection Clause) 5, 13, 17

Voting Rights Act, 42 U.S.C. §§ 1973, *et seq.* . *passim*
§ 2, 42 U.S.C. § 1973 . . . . . 6, 21
§ 4(b), 42 U.S.C. § 1973b(b) 3
§ 5, 42 U.S.C. § 1973c 3-4, 6, 13, 21-24

Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn eds. 1995) 25

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Nos. 94-631, 94-797, 94-929

ZELL MILLER, *et al.*,
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BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVE GARY A. FRANKS, AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide, including many in Georgia. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the ideal of a color-blind society in which the

civil rights of all Americans are equally respected. To that end, WLF has appeared before this Court as well as other state and federal courts in cases raising important civil rights issues. *See, e.g., Adarand Constructors, Inc. v. Pena,* No. 93-1841, *cert. granted*, 115 S. Ct. 41 (1994); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

Congressman Gary A. Franks is serving his third term in the U.S. House of Representatives, representing Connecticut's 5th Congressional District. Rep. Franks is of African-American heritage; the overwhelming majority of voters in his district are white. Rep. Franks testified at the trial of this matter in support of Appellees.

The Equal Opportunity Foundation (EOF) is a non-profit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. EOF has appeared before this Court as *amicus curiae* on a number of occasions, including in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

Amici believe that the people of Georgia were ill-served by the congressional districting scheme being challenged in this case. Racial gerrymandering -- by placing the state's stamp of approval on the notion that people of different races are inherently different from one another -- is a giant step backward from our goal of a color-blind society. Nothing in the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, requires such gerrymandering. Moreover, the experience of Rep. Franks and others demonstrates that blacks are fully capable of winning elections in districts that have not been gerrymandered to ensure African-American electoral majorities.

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief on behalf of Appellees with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Appellees' brief.

In brief, Appellees are residents of Georgia's Eleventh Congressional district who object to the congressional districting plan adopted by the Georgia legislature in March 1992. The plan was expressly designed so that a significant majority of voters in three of the state's eleven congressional districts (the Second, the Fifth, and the Eleventh) are African Americans (hereinafter referred to as "majority-minority" districts). *See* Appendix to Miller Jurisdictional Statement ("J.S. App.") 22 n.12.

Some sort of redistricting scheme had been made necessary by Georgia's substantial population growth during the 1980's, as measured by the 1990 Decennial Census. The growth entitled Georgia to an eleventh seat in the U.S. House of Representatives, whereas it previously had had only ten seats.

The Georgia state legislature initially adopted a redistricting plan in late 1991, which created two majority-minority districts; only one of the state's ten districts during the 1980's had been majority-minority. J.S. App. 12-14. Because Georgia is subject to the special provisions of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c,[1] the

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[1] Section 5 provides that any state with a history of abnormally low voter registration (as defined in 42 U.S.C. § 1973b(b)) must, (continued...)

state submitted this plan to the U.S. Attorney General for pre-clearance.

The Attorney General interposed a timely objection to the plan by letter dated January 21, 1992 (signed by Assistant Attorney General for Civil Rights John Dunne). J.S. App. 14. The letter expressed a "'concern' that the Georgia legislative leadership had decided to 'limit' black voting potential to two majority-minority districts." *Id.* The letter also stated that legislative leaders "did not make a good faith attempt to recognize the concentrations of black voters in the southwest" portions of Georgia by placing them in a majority-minority district. J.A. 105-106. Mr. Dunne refused to preclear the plan based on those findings, apparently concluding that the plan had "the purpose . . . of denying or abridging the right to vote on account of race."

The state legislature then adopted a second districting plan that attempted to respond to some of the concerns raised in Mr. Dunne's January 21, 1992 letter. However, the second districting plan again provided for only two majority-minority districts. J.S. App. 16-17.[2] On March 20, 1992, the Attorney General objected to this second plan as well. The letter interposing the objection stated that "no legitimate reason has been suggested to explain

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[1] (...continued)
before conducting elections that conform with a new districting scheme, obtain a declaratory judgment from the United States District Court for the District of Columbia that the redistricting scheme "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5 further provides that the state need not obtain such a declaratory judgment if the districting scheme has been submitted to the U.S. Attorney General and the Attorney General has not objected thereto within 60 days.

[2] The Georgia Senate passed a bill calling for three majority-minority districts, while the House-passed bill called for two such districts. The Senate eventually acceded to the House-passed version. *Id.*

the exclusion" of large concentrations of black voters from majority-minority districts. J.A. 124. The district court later found (and no party disputes) that the Attorney general knew full well that the only way to include those black voters in majority-minority districts was to draw three such district, along the lines being pressed by black Georgia state legislators. J.S. App. 18. The letter stated that the explanation provided by the state for failing to do so (a reluctance to split counties when drawing up districts) "appears pretextual." *Id.*

Bowing to the Attorney General's clearly expressed preference for a plan creating three majority-minority districts, the Georgia legislature adopted such a plan in March 1992. On April 1, 1992, Georgia submitted this third plan to the Attorney General, and the Attorney General pre-cleared the plan the next day.

Appellees filed suit in January 1994 in the United State District Court for the Southern District of Georgia, alleging that the Eleventh District segregated voters on the basis of race, in violation of their rights under the Equal Protection Clause.[3] Appellees argued that the Eleventh District was shaped in a bizarre fashion that could only be explained as an effort to create a majority-minority district. The district consists of several widely-separated concentrations of black urban voters (in DeKalb County just outside Atlanta, in the Savannah area, and in the Augusta area), but generally excluding the white populations of those same urban areas. The urban portions of the Eleventh

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[3] In their briefs, Appellants repeatedly refer to Appellees as "whites" (*see, e.g.*, Brief for the United States at 7) -- even though Appellants are no doubt aware that Appellees' racial status plays no part in their cause of action. We can find no other explanation for these references other than an intentional effort to mischaracterize this case as one pitting the rights of whites against the rights of blacks. We find it particularly disturbing that the United States government would demean itself in this fashion. The appearance of Rep. Franks in this case as an *amicus curiae* in support of Appellees should put to rest any notion that only whites are disturbed by the intentional classification and separation of voters by race.

District -- which supply it with most of its population -- are connected by thousands of square miles of rural, agricultural lands in east-central Georgia.

Following a trial in July 1994, a three-judge court struck down the Georgia districting plan with respect to lines drawn between the Eleventh District and adjacent congressional districts. J.S. Supp. 1-106. The court held that the plan was subject to "strict scrutiny" because an effort to segregate voters by race was the "overriding" consideration that went into drawing up the Eleventh District. *Id.* at 42-52. The court then held that the plan could not survive "strict scrutiny" because it was not "narrowly tailored" to accomplishing any compelling state interest. *Id.* at 54-89. The court held that while compliance with §§ 2 and 5 of the Voting Rights Act constituted a compelling state interest, the Eleventh District could not be justified on that basis because it was not "narrowly tailored" to that purpose -- because neither § 2 nor § 5 required creation of a majority-minority Eleventh District under the facts of this case. *Id.* at 67-87.

On September 23, 1994, this Court stayed the relief granted by the district court. On January 6, 1995, this Court noted probable jurisdiction over each of the three appeals filed from the district court's judgment.

SUMMARY OF ARGUMENT

Appellees have demonstrated standing to bring this action. Under the Court's *Shaw v. Reno* decision, plaintiffs in racial gerrymandering lawsuits are not required to present evidence that the effects feared by the *Shaw* majority have actually come to pass.

The district court applied the proper standard in determining whether "strict scrutiny" judicial review should be applied in a case challenging congressional reapportionment legislation. The district court properly held that strict scrutiny applies when the plaintiff demonstrates that "race was the overriding predominant

force determining the lines of the district." The district court also correctly determined that Appellees met that reasonably exacting standard.

Finally, Georgia failed to demonstrate that its adoption of legislation creating the Eleventh District was a narrowly tailored response to any compelling interest of the state. The district court properly declined to apply a "strong basis in evidence" standard, which would make it far too easy for states to justify racial classifications. The district court's finding -- that there was no evidence that Georgia's initial decision to create only two majority-minority districts instead of three was based on a racially discriminatory intent -- was not clearly erroneous.

ARGUMENT

I. APPELLEES HAVE STANDING TO PURSUE THEIR EQUAL PROTECTION CLAIM

Given the Court's ruling in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), Appellees' standing to argue that Georgia violated their rights under the Equal Protection Clause by segregating voters by race is not open to serious challenge. Nonetheless, because the Abrams Appellants and several of their supporting *amici* have raised the standing issue, we address the issue briefly.

Citing *Allen v. Wright*, 468 U.S. 737 (1984), the Abrams Appellants contend that Appellees failed to demonstrate the requisite "injury in fact" necessary to establish standing. Brief of Abrams Appellants at 49.

However, the Abrams Appellants fail to cite the discussion of standing in *Shaw*, a racial gerrymandering case in which the plaintiffs' "injury in fact" allegations were identical to Appellees'. *Shaw* explained:

> "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and

> separate voters by race injures voters in . . . ways [other than by diluting a racial group's voting strength]. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. . . [The dissent] does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

Shaw, 113 S. Ct. at 2828.

Various of Appellants' *amici* argue that Appellees lack standing because they failed to introduce specific evidence that racially segregated congressional districts were having the precise effects that *Shaw* feared would result. *See, e.g.*, Brief of *Amici* State of Texas, *et al.*, at 5-11. Such arguments miss the mark. *Shaw* explicitly held that racially segregated congressional districts "injures" voters such within those districts by *threatening* to undermine our system of representative democracy and by *signaling* to elected officials that they represent a particular racial group rather than their constituency as a whole. *Shaw*, 113 S. Ct. at 2828. Thus, *Shaw* makes clear that the constitutional injury is sufficiently demonstrated by evidence that voters have been classified and separated by race -- regardless whether the "threat" to representative democracy comes to pass or whether elected officials catch the "signal" they have been sent regarding who they are suppose to be representing.

The contrary argument espoused by Appellants' *amici* -- that those challenging a racial gerrymander must introduce evidence that the gerrymander is actually having the effects outlined in *Shaw* -- would place an unwarranted burden on those raising such challenges. Challengers would be required, before filing suit, to wait for years after the racial gerrymander has been put into place in order to gather evidence regarding how voters and elected officials act in response to the gerrymander. The Court quite clearly did not contemplate such delays when it

officials act in response to the gerrymander. The Court quite clearly did not contemplate such delays when it recognized a racial gerrymandering cause of action in *Shaw*.

Nor are Appellants and their supporting *amici* correct in asserting that *Shaw* represented a dramatic departure from the Court's established case law on standing. In a variety of contexts, the Court has indicated that standing to assert individuals' civil rights extends to the right to an environment free from state-mandated racial discrimination, without regard to whether the individual has suffered any other injury. Thus, the Court has allowed housing discrimination "testers" who were never actually denied housing on the basis of race (because they never intended to rent the apartment they applied for) to sue for violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, because any housing discrimination on the basis of race "deprived them of the benefits that result from living in an integrated community." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982). Similarly, criminal defendants (*Powers v. Ohio*, 111 S. Ct. 1364 (1991)), civil litigants (*Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991)), and even criminal prosecutors (*Georgia v. McCollum*, 112 S. Ct. 2348 (1992)) are entitled under the Constitution to insist that courtroom adversaries not exercise peremptory challenges to strike jurors on the basis of race (without an individualized showing by those raising the claim that they have been injured by the strike), because allowing any state-sanctioned racial discrimination to infect the trial system calls into question the essential fairness of that system.

As the district court recognized, Appellees "occupy a position virtually identical to those challenging North Carolina's congressional districting plan in *Shaw v. Reno*, and in that case standing was not in doubt." J.S. App. 33. Accordingly, Appellees' standing is not open to serious challenge.

II. STRICT SCRUTINY IS WARRANTED WHENEVER RACE WAS THE OVERRIDING PREDOMINANT FORCE DETERMINING THE LINES OF A CONGRESSIONAL DISTRICT

A long line of decisions from this Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989) (plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court has also been mindful of the potentially harmful effects of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 113 S. Ct. at 2832.

Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-299 (1978)(Powell, J.). *Shaw* put to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination:

> [The dissent] argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S. at

> 494 (plurality opinion); see also *id.* at 520 (Scalia, concurring in judgment). Accord, *Wygant [v. Jackson Board of Education]*, 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw, 113 S. Ct. at 829.

A. A Bizarrely-Shaped District Is Not a Necessary Pre-Condition to a Racial Gerrymandering Claim Under Shaw

Despite *Shaw*'s strongly-worded disapproval of all forms of racial classifications, Appellants argue that the holding in *Shaw* was actually quite limited. They assert that *Shaw* is only applicable when the racial classification and separation of voters by race can be demonstrated by reference to objectively observable features of the voting district under challenge (*e.g.*, a bizarre shape). *See, e.g.*, Brief of Miller Appellants at 38-39; Brief of U.S. at 16-17. Although Appellants readily admit that race played a "large" role in the manner in which the Georgia legislature drew the Eleventh District's lines (Brief of Miller Appellants at 8), they argue that *Shaw* did not contemplate that racial gerrymandering claims could be demonstrated by reference to direct evidence of legislative intent.

Shaw cannot fairly be read in such a limited manner. Rather, *Shaw* held as follows:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Shaw, 113 S. Ct. at 2828. Nothing in that holding suggests that a court may base a decision that a voting district

"rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" only upon the district's bizarre shape. To the contrary, *Shaw*'s reference to "an *effort* to separate voters" (emphasis added) indicates that the touchstone is legislative intent. While a voting district's bizarre shape may be strong evidence that the legislature intended the separation of races, nothing in *Shaw* suggests that a bizarrely-shaped district is a necessary ingredient of a racial gerrymandering claim. When, as here, Appellants readily admit the predominant role played by race in the structuring of the Eleventh District, there is little need for courts to resort to indirect methods of determining legislative intent, such as examining the district's shape.

The United States makes a half-hearted effort to assert that bizarrely-shaped racially gerrymandered districts are somehow worse than districts that are not bizarrely shaped but that nonetheless cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. The United States asserts that the negative effects of a racial gerrymander identified by *Shaw*:

> [M]ay flow from a district whose extraordinary appearance advertises that the legislature was according special treatment to members of a minority group that it would not give to others similarly situated.

Brief of United States at 20. But surely those same injuries would flow from any district -- regardless whether it was bizarrely shaped -- that cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. So long as there is a general "underst[anding]" that the legislature was acting for no other purpose but to separate voters by race, the reaction of voters and elected officials will be the same regardless of the district's shape.

The United States also argues -- in support of its limiting construction of *Shaw* -- that courts should be

extremely reluctant to examine legislative intent in the absence of objectively observable evidence of intent (*i.e.*, a bizarrely shaped district) because of the difficulty in ascertaining a legislature's "overriding" or "predominant" motive. Brief of United States at 21-22. That argument is disingenuous coming from the federal government, which regularly engages in exhaustive examination of legislative intent in connection with its pre-clearance authority under § 5 of the Voting Rights Act. Indeed, the Attorney General refused pre-clearance to each of the Georgia legislature's first two post-1990 congressional districting plans because he found that those plans had been adopted with the *intent* of abridging minority voting rights. The United States makes no attempt to explain why a close examination of legislative intent is proper when the issue is compliance with § 5 but not when the issue is compliance with the Equal Protection Clause.[4]

In sum, *Shaw* is applicable to any electoral district that rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race -- regardless whether the district's shape could properly be termed "bizarre." Clearly, a bizarre shape is some evidence of the legislature's intent, but it is neither a necessary nor a sufficient condition for a *Shaw*

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[4] In support of its argument, the United States cites *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), for the proposition that "the Court has rejected judicial inquiry into whether 'a particular purpose,' out of many that may have motivated a 'legislative or administrative' body operating under a broad mandate' to make a decision, 'was the "dominant" or "primary" one.'" Brief of United States at 21. That misleadingly truncated quotation from *Arlington Heights* turns the decision in that case on its head. *Arlington Heights* stated that the normal judicial reluctance to examine legislative intent goes out the window when a plaintiff alleges that a legislature was motivated by racially discriminatory intent. Immediately after the language cited by the United States, the Court stated: "But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265.

claim. What constitutes a "bizarre" district is obviously in the eye of the beholder: we view the Eleventh District as bizarrely shaped, while Appellants do not; and there is no objective method of measure bizarreness. In light of that basic definitional problem, there is little sense in making the existence of a *Shaw* claim turn on characterizations of the district's shape.

B. The District Court's Standard Will Not Subject Every Redistricting Effort to Exacting Judicial Review

Appellants argue that the standard of review applied by the district court is overly harsh and will subject every legislative redistricting effort to a "strict scrutiny" standard of review. The Miller Appellants argue, for example, that race is "invariably" a factor in redistricting cases (Brief at 6-8), and that the district court's holding that any redistricting decisions based on race are subject to strict scrutiny "arrogate[s] to the courts the classic role of 'super-legislature' that our Constitution forbids." Miller Brief at 38.

Appellants' arguments are based on a misreading of the district court's quite limited decision in this case. The district court did not hold that strict judicial scrutiny is warranted whenever race is *a* motivating factor is district line drawing. Rather, the court reserved strict scrutiny for those cases in which:

> [T]he legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding predominant force* determining the lines of the district. If race, however deliberately used, was one factor among *many of equal or greater significance* to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

J.S. App. at 36 (emphasis in original).

This moderate approach to judicial review takes into account the common-sense distinction that the Court has regularly drawn between conduct with a discriminatory purpose and conduct taken "in spite of" its consequences:

> 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effect upon an identifiable group.

City of Mobile v. Bolden, 446 U.S. 55, 71 n.17 (1980) (quoting *Personnel Manager of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). In other words, states need not worry that their districting plans will be struck down as constituting an unconstitutional racial gerrymander merely because drafters were aware of the effect that the plan would have on various racial groups.

Nor would the district court's standard require strict scrutiny review whenever a legislature intended to construct a majority-minority district. The district court recognized that so long as such a district also can "rationally . . . be understood" as being intended to serve nonracial goals (*Shaw*, 113 S. Ct. at 2828), then strict scrutiny is unwarranted. Thus, for example, Georgia's Fifth Congressional District (which encompasses much of Atlanta's black population) clearly would not be subject to strict scrutiny under the district court's standard, even though the Georgia legislature intended to draw the Fifth District as a majority-minority district and even though it would be quite easy to draw districts in the Atlanta area such that none would be majority-minority. Strict scrutiny would be inapplicable, because the Fifth District can rationally be understood as serving two nonracial goals of the Georgia legislature: the district is reasonably compact, and it was drawn up in a manner designed to enhance the incumbent's ability to be re-elected.

It is equally obvious that the district court was correct in determining that the Eleventh District should be subjected to strict scrutiny under the district court's standard. The history leading up to adoption of the Eleventh District -- particularly Georgia's unwillingness to draw such a district until virtually ordered to do so by the U.S. Department of Justice -- makes clear that, absent racial considerations, Georgia would never have drawn a district even remotely resembling the Eleventh District but for the purpose of creating a majority-minority district. Georgia had never before attempted to draw a district linking black sections of DeKalb County to distant urban areas surrounding Augusta and Savannah. Moreover, when Georgia decided in March 1992 to do so for the first time, it chose to link those sections of DeKalb County not with the entire cities of Augusta and Savannah, but rather with only the black sections of those cities. Those two decisions were crucial to the legislature's ability to draw three majority-minority districts, and Appellants have put forward no nonracial explanation for these crucial components of the Eleventh District.

In arguing that nonracial considerations went into the drawing up of the Eleventh District's lines, Appellants point to efforts by state election officials to avoid splitting many of the rural counties contained in the Eleventh District, and to the fact that the district's line "is predominantly located on geographical and political markers that have local significance wholly independent of race." Brief of Miller Appellants at 45. Appellants are correct that Eleventh District is more "regular" in shape than the district originally proposed by the ACLU and other early champions of three majority-minority districts. But no amount of smoothing out of "bumps" in the Eleventh District can obscure that: (1) two highly irregular features of the district -- the linking of DeKalb County with distant urban areas with which it had never previously been linked and the decision to include only black neighborhoods in the linkage -- were undeniably included for the purpose of creating a majority-minority district; (2) three majority-minority districts could not have

been drawn unless those two feature were included in the Eleventh District; (3) Georgia knew that it would not receive pre-clearance from the Justice Department until it submitted a congressional redistricting plan that included three majority-minority districts. In light of that evidence, the district court correctly concluded that race was the "overriding predominant force determining the lines" of the Eleventh District.

Nor can Georgia escape strict scrutiny by arguing that its nonracial motive was a desire to obtain pre-approval from the Justice Department. When a governmental body bows to pressure to act in a certain manner and is aware that the party pressuring it to act is doing so for racially discriminatory reasons, the federal courts have never permitted the governmental body to escape scrutiny under the Equal Protection by arguing that it did not share in the discriminatory motive. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987)("A governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."); *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich 1982)(same), *affirmed as modified*, 727 F.2d 560 (6th Cir. 1984), *cert. denied*, 469 U.S. 821 (1985).

In sum, the district court's standard for determining whether strict judicial scrutiny should be applied to the Eleventh District is faithful to this Court's admonition in *Shaw* that the Equal Protection Clause forbids districting legislation which, "although race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw*, 113 S. Ct. at 2828. Moreover, the district court's finding that application of strict scrutiny is appropriate in this case is fully consistent with the court's factual findings.

III. THE ELEVENTH CONGRESSIONAL DISTRICT CANNOT WITHSTAND STRICT SCRUTINY

Shaw held that once districting legislation is found to be "unexplainable on grounds other than race," it is subject to "the same close scrutiny" that the Court has given to "other state laws that classify citizens by race." *Shaw*, 113 S. Ct. 2825. Under those circumstances, the legislation is unconstitutional unless the state can demonstrate that its legislation "is narrowly tailored to further a compelling governmental interest." *Id.* at 2832.

Georgia contends that it has a compelling interest in complying with the Voting Rights Act and that it adopted its redistricting scheme in order to further that compelling interest. While recognizing that compliance with the Voting Rights Act (to the extent that it is constitutional as applied) constitutes a "compelling" state interest, the district court held that the Eleventh District could not pass constitutional muster because it is not "narrowly tailored" to achieving the goal of Voting Rights Act compliance. J.S. App. 59-89. That conclusion is fully supported by the evidence before the district court and relevant case law.

A. The District Court Properly Declined to Apply the "Strong Basis in Evidence" Standard

The United States argues that -- even assuming the applicability of strict scrutiny to this case -- the district court used an improper strict scrutiny standard. Brief for U.S. at 28. The district court held that in order to invoke the Voting Rights Act as justification for its action, Georgia was required to show that the Act mandated the drawing of three majority-minority districts. The United States argues that a lesser showing is required:

> [I]t need only be shown that there was a "strong basis in evidence" for the State's actions -- a standard that is satisfied if there was a sound basis for believing that the State's failure to draw a third majority-minority

> district would have led to a prima facie case against it under either Section 2 or 5 of the Voting Rights Act.

Id. at 28-29.

The United States's efforts to import the "strong basis in evidence" standard into this case is wholly misplaced. None of the case law cited by the United States (including *Croson* and *Wygant*) supports application of that standard in this case.

In contrast to this case (in which Georgia claims a compelling interest in prospective compliance with the Voting Rights Act), *Croson* and *Wygant* involved state actors attempting to defend race-based classifications by claiming a "compelling interest" in overcoming the present effects of past race discrimination. *Croson* held that such classifications could be upheld only upon a showing of a "strong basis in evidence" that there existed present effects of past discrimination by the state actor (*Croson*, 488 U.S. at 500) and that the race-based classification was "narrowly tailored" to eliminating such present effects. *Id.* at 507. The considerations that led the Court to adopt the "strong basis in evidence" standard in *Croson* and *Wygant* are inapplicable to this case.

The rationale behind the "strong basis in evidence" standard (a standard which places on defendants an evidentiary burden that is somewhat less than a "preponderance of the evidence" standard) was best explained in Justice O'Connor's concurring opinion in *Wygant*. She explained that to hold a state actor, whose "remedial" racial preference program has been challenged, to a "preponderance of the evidence" standard might discourage states from attempting to eliminate the continuing effects of past unconstitutional racial discrimination -- because any state making such a showing might expose itself to claims from victims of that past discrimination. *Wygant* at 291-92 (O'Connor, J., concurring in part and concurring in the judgment). Thus, a modicum of deference is granted to a state actor's evidence of continuing effects of past discrim-

ination, in order to encourage voluntary race-based remedies where there is strong evidence that such remedies are needed.

That rationale is of no relevance here, where Georgia does not claim to be attempting to overcome any continuing effects of past discrimination.[5] Rather, Georgia argues that its new congressional districting scheme is justified by a compelling interest in ensuring that now and in the future it will be in compliance with the Voting Rights Act. Requiring Georgia to come forward with evidence to support its claim that it had no choice under the Voting Rights Act but to draw district lines as it did will not expose Georgia to new liability claims, since past racial discrimination by Georgia is irrelevant to whether the *new* district lines comply with the Voting Rights Act.

More importantly, the district court did not base its decision on a finding that Georgia had failed to demonstrate a compelling interest in compliance with the Voting Rights Act. Rather, the court held that the Eleventh District was not narrowly tailored to achieving that compelling interest. *Croson* and *Wygant* did not apply the "strong basis in evidence" standard to the narrowly tailored test -- because requiring a state actor to introduce evidence that its remedial program is narrowly tailored does not expose the state actor to new liability. Rather, *Croson* required state actors to meet their evidentiary burden on

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[5] We note that other Appellants and supporting *amici do* argue that the Georgia districting scheme can be justified as an attempt to overcome the continuing effects of past racial discrimination. But the only "continuing effect" they cite is racially polarized voting, and there is no evidence in the record to support the counter-intuitive notion that classifying and segregating voters by race will reduce racially polarized voting. Moreover, there is little evidence to suggest that the moderate degree of racially polarized voting found by the district court to exist in Georgia is attributable to the severe discrimination historically inflicted on black voters in Georgia; racially polarized voting appears to be no more extreme in Georgia than in states without its history of voting discrimination.

the "narrowly tailored" issue by a preponderance of the evidence. *Croson*, 488 U.S. at 507.

In sum, the district court properly held that, in order for Georgia's districting scheme to survive strict scrutiny, Georgia would have to demonstrate by a preponderance of the evidence that its districting scheme was mandated by the Voting Rights Act.

B. The Eleventh District Is Not Narrowly Tailored to Furthering a Compelling Interest in Complying with the Voting Rights Act

After conducting a trial in this matter, the district court determined that the Eleventh District was not narrowly tailored to furthering Georgia's compelling interest in complying with either § 2 or § 5 the Voting Rights Act. Factual findings made by the district court in connection with that determination are subject to review under the clearly erroneous standard. Appellants do not argue that any of the district court's factual findings were clearly erroneous -- including its finding that there was no evidence that Georgia's first districting plan was motivated by an intent to abridge minority voting rights. J.S. App. 13. The district court's factual findings compel a conclusion that the Eleventh District cannot survive strict scrutiny because it is not narrowly tailored to furthering any compelling interest of the state.

The district court's opinion sets forth in detail why neither § 2 nor § 5 of the Voting Rights Act compelled Georgia to draw three majority-minority districts. *Amici* find the opinion persuasive and thus will not repeat all of the district court's argument. We nonetheless wish to respond to a number of the points in this regard raised by Appellants and their supporting *amici*.

Despite the district court's finding that Georgia's initial districting plan (which called for the creation of two majority-minority districts rather than three) was not motivated by a intent to abridge minority voting rights, the

United States continues to insist that there was a strong evidentiary basis for concluding that failure to create three majority-minority districts would have violated § 5 of the Voting Rights Act. While admitting that the first plan would not have violated § 5's non-retrogression principle,[6] the United States argues that Georgia might still have been found in violation of § 5's prohibition against new districting schemes whose "purpose" was to abridge minority voting rights. Brief of U.S. at 29-30.

The "evidence" cited by the United States in support of that "purpose" argument is insubstantial. First, the United States argues that discriminatory purpose can be inferred based on Georgia's past history of discrimination against black voters. *Id.* at 32. But the none of the evidence of past discrimination is recent, and the United States makes no attempt to demonstrate why -- contrary to the Federal Rules of Evidence -- evidence of past bad acts tends to show that Georgia acted with discriminatory purpose on this occasion.

Second, the United States argues that Georgia's willingness to split counties (apparently for partisan, nonracial reasons) in creating the Fourth District is evidence that Georgia's unwillingness to do so for purposes of creating three majority-minority districts was pretextual. *Id.* We find this argument particularly ironic in light of the United States's current defense of the Eleventh District: that its borders can be explained in considerable part by the state's desire to keep political units intact to the extent possible when drawing district line. That defense is an acknowledgment that Georgia's aversion to splitting

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[6] The non-retrogression principle, as articulated in *Beer v. United States*, 425 U.S. 130 (1976), holds that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Since the first Georgia districting plan would have increased the number of majority-minority districts from one to two, the first plan clearly did not violate the non-retrogression principle.

counties is a legitimate and sincerely held districting principle -- and undercuts any evidence that Georgia's unwillingness to split counties as part of its first districting plan was a pretext for racial discrimination.

Third, the United States argues that intent to discriminate can be inferred from mere knowledge that failure to create a third majority-minority district would lead to election of fewer black Members of Congress than if a third majority-minority district were created. *Id.* at 33. But, as noted above, this Court has always carefully distinguished between intent as awareness of consequences and intent as purposeful selection of a course of action "because of" the adverse effects of such action on an identifiable group -- with only the latter constituting purposeful discrimination. *City of Mobile*, 446 U.S. at 71 n.17. Accordingly, such knowledge on the part of Georgia legislators adds nothing to the United States's "intent" argument. *See also, New York v. United States*, ___ F. Supp. ___, 1994 WL 744179 (D.D.C. 1994)(rejecting United States's claim that evidence of knowledge of consequences can be equated with intent for purposes of § 5 preclearance).

In sum, there is no evidence to suggest that Georgia's first districting plan violated § 5 of the Voting Rights Act; accordingly, the district court's decision to that effect is certainly not clearly erroneous.

Some of the Appellants and their supporting *amici* complain that the district court -- in making that finding -- failed to accord proper deference to the Attorney General's January 1992 letter finding that the first districting plan did not comply with § 5. But the language of § 5 itself suggests that no deference is due;[7] and on

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[7] *See* 42 U.S.C. § 1973c ("Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement."). Moreover, the provision of § 1973c granting a (continued...)

numerous occasions court decisions have, over the objections of the Attorney General, entered declaratory judgment in favor of a covered jurisdiction to the effect that its redistricting plan complied with § 5 -- without giving any indication that the Attorney General's objections are entitled to deference. *See, e.g., Beer v. United States*, 425 U.S. 130 (1976).

Moreover, Appellees were not parties to the pre-clearance proceedings in front of the Attorney General and thus cannot be bound by any findings in those proceedings. Any effort to give special weight in these proceedings to administrative findings rendered in a proceeding to which Appellees were not parties runs afoul of the teachings of *Martin v. Wilks*, 490 U.S. 755 (1989)(city sued by white firefighters alleging racial discrimination in promotions may not defend by arguing that blacks were given preference pursuant to a federal-court consent decree, where white firefighters were not parties to the prior federal court action).

Finally, we take strong issue with those among Appellants and *amici* who argue that states have a compelling interest in drawing majority-minority districts because, in the absence of such districts, whites will not vote for blacks in sufficient numbers to permit election of blacks to public office. Racially polarized voting is a sad fact of life in this country -- but it is clearly on the decline, as witnessed by the recent elections of Gary Franks, J.C. Watts, and Alan Wheat to the U.S. House of Representatives; Carol Moseley-Braun to the U.S. Senate, and Douglas Wilder as Governor of Virginia. All are African Americans elected in jurisdictions in which the overwhelming majority of voters are white. Indeed, 83% of the black mayors elected in cities of 50,000 or more in

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[7] (...continued)
covered jurisdiction the option of bypassing the Attorney General altogether and going straight to court to obtain pre-clearance suggests that the Attorney General's findings in this area are not entitled to any special weight.

the past 30 years have not had the benefit of a majority-black constituency.[8] It would be tragic if the progress that this nation is making toward color-blind voting were reversed by state decisions to classify and separate voters by race.

CONCLUSION

Amici curiae Washington Legal Foundation, Rep. Gary A. Franks, and the Equal Opportunity Foundation respectfully request that the Court affirm the decision of the lower court.

Respectfully submitted,

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Dated: March 27, 1995

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[8] Sixty-one percent were elected in municipalities less than 40% black, and 43% took office in cities less than 30% black. Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn eds. 1995).

(13)

Nos. 94-631, 94-797, and 94-929

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, ET AL.,

Appellants,

vs.

DAVIDA JOHNSON, ET AL.,

Appellees.

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLEES

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87 pp

LUCIOUS ABRAMS, JR., ET AL.,

Appellants,

vs.

DAVIDA JOHNSON, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

DAVIDA JOHNSON, ET AL.,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT

GEORGIA'S ADOPTION OF THE THIRD PLAN AND CREATION OF THE ELEVENTH DISTRICT VIOLATED EQUAL PROTECTION PRINCIPLES AND THEREFORE PROPERLY TRIGGERED STRICT SCRUTINY BECAUSE THE LEGISLATURE USED RACE AS THE SUBSTANTIAL OR MOTIVATING CONSIDERATION IN REDISTRICTING 7

A. Georgia's Third Plan Constitutes A Racial Classification Antithetical To Our Democratic System Of Representative Self-Government . . . 9

B. The District Court Correctly Applied The Equal Protection Principles That Have Been Articulated By This Court 12

C. States Must Comport With Equal Protection Principles When Creating Voting Districts 15

D. Nothing In *Shaw* Or *UJO* Precludes The Court From Affirming The Holding Of The District Court 17

E. *Shaw* Did Not Add A New Requirement—Bizarreness Of Shape—To The Settled Elements Of An Equal Protection Claim 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Anderson v. Martin, 375 U.S. 399 (1964) 11

Boston Firefighter's Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983) 2

Brown v. Board of Educ., 347 U.S. 483 (1954) 2, 21

Cardona v. Power, 384 U.S. 672 (1966) 2

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 2, 16

De Funis v. Odegaard, 416 U.S. 31 (1974) 2

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 2

Fullilove v. Klutznick, 448 U.S. 448 (1980) 2

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 9

Harper v. Virginia St. Bd. of Elections, 383 U.S. 663 (1966) 16

Johnson v. De Grandy, 114 S. Ct. 2647 (1994) 2, 8

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) . . . . . *passim*

Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968) . . . 2

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 2

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 2

Mobile v. Bolden, 446 U.S. 55 (1980) 16

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 16

Palmore v. Sidoti, 466 U.S. 429 (1984) 2

Plessy v. Ferguson, 163 U.S. 587 (1896) 21

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 2, 16

Runyon v. McCrary, 427 U.S. 160 (1976) 2

Shaw v. Reno, 113 S. Ct. 2816 (1993) . . . . . *passim*

Shelley v. Kraemer, 334 U.S. 1 (1948) 2

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 2

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 14

United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977) 2, 13, 17

United Steelworkers v. Weber, 443 U.S. 193 (1979) . . . 2

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) . . . 8, 13, 14

Washington v. Davis, 426 U.S. 229 (1976) 7, 12, 14

Wright v. Rockefeller, 376 U.S. 52 (1964) 11, 18

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 2, 16

STATUTES, REGULATIONS AND RULE

42 U.S.C. § 1973(b) 16

42 U.S.C. §§ 1973b-c 3

28 C.F.R. § 51.54(a) 16

Supreme Court Rule 36.2 1

SECONDARY AUTHORITIES

John Hart Ely, *Democracy and Distrust* 87 (1980) 21

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 94-631

ZELL MILLER, ET AL., APPELLANTS,

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No. 94-929

UNITED STATES OF AMERICA, APPELLANT,

vs.

DAVIDA JOHNSON, ET AL., APPELLEES.

On Appeal From The United States District Court
For The Southern District of Georgia

BRIEF *AMICUS CURIAE* OF
ANTI-DEFAMATION LEAGUE
IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS*

This brief is submitted on behalf of the Anti-Defamation League ("ADL") as *amicus curiae*. Pursuant to Rule 36.2 of the Rules of this Court, ADL has obtained and files herewith the written consent of all parties to this appeal to the submission of this brief.

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or of the majority, and in assuring that each individual receives equal treatment under the law regardless of that person's race, ethnicity, or religion. ADL advocates that each citizen has a constitutional right to be treated as an individual, rather than as a component part of a racial or ethnic group.

Among its many activities directed to these ends, ADL has filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *De Funis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighter's Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). In the area of voting rights, ADL has filed *amicus* briefs in *Cardona v. Power*, 384 U.S. 672 (1966); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); and most recently in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).

ADL submits this brief to advance its conviction that redistricting substantially motivated by racial considerations impairs the liberties secured by the Equal Protection Clause of

the Fourteenth Amendment to the United States Constitution. In ADL's view, such state action offends core equal protection principles, is inimical to democratic values, and undermines the fundamental importance of the franchise to our society and democratic system of government.

In taking this position, ADL strongly reaffirms its principled adherence to a policy opposing racial classifications of all kinds. Although ADL recognizes that the goal of increasing specific minority group participation in the political process is commendable, ADL equally insists that racial classification in redistricting—the premise of maximization and proportionality—is constitutionally indefensible and, in the end, will defeat the laudable motives of the appellants. The presumption that *only* a member of a certain race can or will effectively represent his or her constituents of that same race is antithetical to the goal of a society—and a Constitution—blind to racial classifications.

STATEMENT

Following the 1990 Census, the State of Georgia became entitled to an increase in the number—from ten to eleven—of its seats in the United States House of Representatives. *Johnson v. Miller*, 864 F. Supp. 1354, 1360 (S.D. Ga. 1994). The Georgia General Assembly convened in August 1991 to create an eleventh district and, pursuant to the preclearance requirements of Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973b-c ("Voting Rights Act"), submitted a redistricting plan to the United States Department of Justice ("DOJ") on October 1, 1991. *Id.* at 1363. DOJ refused preclearance. *Id.*

The Georgia General Assembly approved and submitted a second plan to DOJ on March 3, 1992. *Id.* at 1364. Both the first and the second plans contained two majority black districts, the Second District and the Fifth District. DOJ again refused preclearance. *Id.* at 1365. Georgia prepared and submitted a third plan on March 31,

1992. This plan contained three majority black districts, the Second, Fifth, and Eleventh Districts. DOJ approved the third plan on April 2, 1992. *Id.* at 1367.

The Georgia legislature had adopted redistricting guidelines and objectives that it adhered to throughout the legislative redistricting process. *Id.* at 1360. After the first plan was rejected by DOJ, however, one of these objectives became predominant: It "soon became obvious" that no plan would gain preclearance by DOJ unless the Eleventh District included a majority of blacks of voting age. *Id.* at 1363-64.

The district court found, and the parties do not seriously dispute, that the revisions that the Georgia Assembly made to its initial plan in order to obtain DOJ preclearance were "purely race-based." *Id.* at 1377. In its brief in this Court, Georgia concedes that "[t]he only real dispute concerning the general question of race and congressional reapportionment related to whether Georgia should have two or three majority black districts"; that "the general objective of enacting a majority-minority [Eleventh] district [in the third and final plan was] never in dispute"; and that "it is indisputably true that the Eleventh District was purposely drawn as a majority-minority district." Brief of Appellants Miller, et al. ("Miller Br.") at 8, 9-10, 23; *see also* Brief of the United States ("U.S. Br.") at 6 ("In enacting this plan, the State clearly intended to create three majority-minority districts.").

That the redistricting plan was expressly adopted in order to manipulate election results along racial lines is also not subject to dispute. Thus, the Speaker of the Georgia House of Representatives testified at trial that certain district boundaries were drawn based upon race in order to "guarantee a black would be elected from there." 864 F. Supp. at 1377.

Appellees commenced their action in the district court on January 13, 1994. *Id.* at 1369. They alleged, among other things, that adoption of the third plan and the creation of the

Eleventh District for the reasons set forth above violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1359.

Observing that the Eleventh District was the product of "government allocations on the basis of race, coupled with drawing lines tracing concentrations of black citizens, smack[ing] of government-enforced ghettoization," the district court determined that the redistricting plan, insofar as it was designed for the primary purpose of creating a third majority-minority district, was subject to constitutional strict scrutiny. *Id.* The district court analyzed the third plan under that standard and, finding that it did not survive such strict scrutiny, held that the plan was violative of the Equal Protection Clause. *Id.* at 1393.

This appeal followed.

SUMMARY OF ARGUMENT

Having demonstrated by its adoption of the first and second plans that it could design a constitutionally sound redistricting scheme that resulted neither in minority dilution nor minority retrogression in violation of the Voting Rights Act, the Georgia legislature may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, modify that plan and redraw district boundaries based predominantly on racial considerations. Georgia concedes that the third plan and the Eleventh District were products of a racial classification and not of a traditional combination of various districting principles. Race was the substantial and motivating factor in the adoption of the third plan and the creation of the Eleventh District.

The constitutional right of the vote is fundamental to our system of democratic self-government. The voting right must be protected from attempts, however broadly favored or well-intentioned, to manipulate the predicted results of elections according to race. Appellants' premise—that the Constitution will tolerate the third plan's race-based creation

of political majorities—is repugnant to and unacceptable in this nation's democratic system of representative self-government.

The Court's equal protection jurisprudence furnishes the proper standard of review with respect to Georgia's legislative action. Whenever state action outside the context of redistricting has any racially discriminatory intent or purpose, it invokes strict scrutiny. Legislatures are always *aware* of race in redistricting, just as they are aware of other demographic factors; yet states may not racially gerrymander. When race is the substantial or motivating factor in redistricting, strict scrutiny is compelled under the Equal Protection Clause.

Nothing in the Voting Rights Act exempts a state from satisfying the principles enunciated by the Equal Protection Clause. DOJ's mandates and regulations do not and cannot immunize a state from the requirement that it comply with rudimentary and well settled Equal Protection Clause principles in the creation of voting districts.

This Court has never held that the use of race as the substantial or motivating factor in redistricting is constitutionally permissible. Intent to segregate the electorate according to race, however established, is a necessary element of a cause of action for violation of the Equal Protection Clause in the redistricting context. The facially irregular shape of a voting district is one, but not the only, method for establishing such intent; it is not an element of a claim. Where racial intent or purpose is the predominant motive behind state action in redistricting, an equal protection claim is stated.

ARGUMENT

GEORGIA'S ADOPTION OF THE THIRD PLAN AND CREATION OF THE ELEVENTH DISTRICT VIOLATED EQUAL PROTECTION PRINCIPLES AND THEREFORE PROPERLY TRIGGERED STRICT SCRUTINY BECAUSE THE LEGISLATURE USED RACE AS THE SUBSTANTIAL OR MOTIVATING CONSIDERATION IN REDISTRICTING

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). This appeal requires the Court to apply this fundamental precept to redistricting. The Court must determine whether a state may use a racial classification as its primary motive in adopting a redistricting plan.

ADL emphatically agrees with the district court's central holding that "in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question." *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994) (emphasis in original) (footnote omitted). The court properly explained that, where the state legislature "(a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district," strict scrutiny is compelled. *Id.* (emphasis in original). It bears emphasis that the court used the term "'motivating' in the sense that race was the most prominent element driving the legislature's planning, not in the sense of one motivation among others of equal strength propelling the process." *Id.* at 1372 n.19.

Appellants criticize "the rule of law [the district court] adopts, which holds that racial purpose is the controlling issue." Miller Br. at 30. The district court properly focused

on discriminatory legislative intent or purpose as the touchstone of the inquiry. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Where a state has adopted a districting plan that conforms to all traditional redistricting standards and requirements—as Georgia may have done here in the first and second plans—and in the absence of a finding of unlawful dilution or retrogression, it was constitutionally impermissible for that state to modify that redistricting plan and adopt a different one where race was the substantial or motivating consideration in doing so.

Whatever features the third and final plan shared with the first and second plans—such as relative size, length and contiguity of borders, respect for incumbency, intactness of counties, even "bizarreness" of shape—can for the purpose of this analysis be set to one side. The first and second plans may have been the result of the "pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 114 S. Ct. 2647, 2661 (1994); clearly the third was not. The primary and substantial motivation of the third plan, constitutionally differentiating it from the others, was to classify the electorate according to race. ADL argues that Georgia may not approve a voting district that was created with such an intent or purpose.

This point—vital to the constitutional analysis offered by ADL—merits elucidation. This appeal does not raise the issue, set forth in the United States' brief, of whether "*a* 'predominant motive' to create a majority-minority district alone requires strict scrutiny." U.S. Br. at 13 (emphasis added). The district court condemned state action where race was *the* substantial or motivating consideration in creating the district in question—where race was *the* overriding and predominant force determining the lines of the district. *Johnson*, 864 F. Supp. at 1372. Race was merely one of several considerations in adopting the first two plans; when

these plans were rejected and the third plan was adopted, however, race was *the* substantial and motivating consideration. This the Constitution will not permit, absent compelling justification and narrow tailoring.

A. Georgia's Third Plan Constitutes A Racial Classification Antithetical To Our Democratic System Of Representative Self-Government.

This case presents a racial classification strikingly similar to that condemned by the Court nearly thirty-five years ago in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, the Court struck down a realignment of the boundaries of a political subdivision effected by legislation "solely concerned with segregating white and colored voters by fencing Negro citizens out." *Id.* at 341. Whether the action of the Georgia General Assembly is characterized as fencing black voters in, or fencing white voters out, such an objective was patently the predominant concern of the legislature when it modified the second plan and adopted the third, and it is therefore constitutionally suspect.

As Justice Frankfurter wrote for the *Gomillion* Court, "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Id.* at 346. Although *Gomillion* was decided under the Fifteenth Amendment, the Court has explicitly recognized that the "unlawful segregation of races of citizens" into different voting districts is equally offensive in the Fourteenth Amendment context. *Shaw v. Reno*, 113 S. Ct. 2816, 2825-26 (1993) (quoting *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring)). This Court has held that *Gomillion* supports the contention that where district lines are obviously drawn for the purpose of separating voters by race, scrutiny under the Equal Protection Clause is mandated. *See id.* at 2826.

Appellants seek to avoid this logic by persuading the Court that Georgia's explicit race-conscious conduct in racially

manipulating the vote had a benign motive; they seek to disguise the offensiveness of the conduct by using inoffensive language to characterize it. The United States terms the third plan merely an indication that Georgia was "willing to treat minority interests on a par with those of other groups for whom majority influence districts are created." U.S. Br. at 14. It further argues that Georgia has not "taken action that gives a special preference to [blacks] that it is unwilling to give to others who are similarly situated." *Id.* at 20.[1] The United States would have this Court conclude that a state acts properly when it racially manipulates voting districts "in an effort to achieve a fair allocation of political power between white and nonwhite voters." *Id.* at 39.

It emphatically is *not* the domain of the State of Georgia or of the United States to "allocate political power" on the basis of race. Political majorities exist; they are not "created." The democratic system assumes that the interests of majorities are given voice through the franchise, not manipulated through a process by which "majority influence districts are created." Such an argument relies upon precisely the offensive logic and race-infected presumptions that *Shaw* denounced:

> It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc

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[1] The United States also attempts to justify the third plan as a way "to give minority voters an opportunity to elect the candidates of their choice." *Id.* at 42. This contention is disingenuous. Residents of the newly-created Eleventh District could always vote for the candidate of their *choice*. In fact Georgia was seeking to assure the *election* of a candidate of a particular *race*.

> voting that majority-minority districting is sometimes said to counteract.

Shaw, 113 S. Ct. at 2827.[2]

The Court has not tolerated in the past, and should not now tolerate, "the deliberate segregation of voters into separate districts on the basis of race." *Id.* at 2824. In the exercise of the self-determinative voting right, "[t]he vice [of unconstitutional race-specific state action] lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (barring Louisiana from putting on a ballot opposite a Negro candidate's name the word "Negro" because it was a device that encouraged racial discrimination).

As *Shaw* notes, racial classifications in redistricting are "altogether antithetical to our system of representative democracy." 113 S. Ct. at 2827. Justice Douglas, in his dissent in *Wright v. Rockefeller*, expounded upon this principle in language that has particular force to this appeal:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

376 U.S. 52, 67 (1964) (Douglas, J., dissenting). If the Equal Protection Clause is to have actual meaning in our society,

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[2] Even if, as the United States argues, districting is the process of fairly allocating political power, the Equal Protection Clause prohibits political power allocated on the basis of race. *See* discussion *infra* Point B.

surely a fundamental principle that it enunciates is the right of all citizens to participate in an electoral process that is not substantially dominated by racial considerations.

B. The District Court Correctly Applied The Equal Protection Principles That Have Been Articulated By This Court.

Appellants argue that "the district court's reliance on cases outside the voting area for its view that race-motivated districting is unconstitutional is misplaced." Miller Br. at 34. ADL submits, to the contrary, that the equal protection principles articulated in the Court's Equal Protection Clause decisions furnished the district court with the correct standard to be applied in redistricting cases.

The district court noted that "[i]f race, however deliberately used, was one factor among *many of equal or greater significance* to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny." *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994). However, where racial motivation was of substantially greater importance to the state than any other factor it considered in drawing the district, strict scrutiny is required. *Id.* Thus, the district court properly focused its inquiry "on the relative weight of the different motivations that produced the district under attack." U.S. Br. at 19.[3]

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court made abundantly clear that the Equal Protection Clause bars state action that has a "racially discriminatory intent or purpose." The Court held that the proper judicial inquiry is

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[3] The United States also argues that "[t]he fact that a state strongly desires to create a particular district with a majority-minority population says nothing about whether the state has taken action that amounts to a special preference for that group." U.S. Br. at 20. However, "special preferences" for a particular race are not the touchstone of the inquiry; that touchstone remains whether Georgia had an overriding "racially discriminatory intent or purpose" in adopting the third plan. It did.

what that state "purpose" was. 426 U.S. 229, 242 (1976). The Court reaffirmed the application of this principle in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, holding that where "a discriminatory purpose has been a motivating factor in the [legislative] decision," the Equal Protection Clause is violated. 429 U.S. 252, 265-66 (1977).

Strict application of this standard to redistricting cases that implicate the Voting Rights Act is not practicable, however, because, as the Court in *Shaw* observed, "the legislature always is *aware* of race when it draws district lines." *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993) (emphasis in original); *see also United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 161 (1977) (recognizing that a state may use racial factors in redistricting without violating either the Equal Protection Clause or Section 5 of the Voting Rights Act). Hence, the *Shaw* Court noted that this "sort of race consciousness does not lead inevitably to impermissible race discrimination." 113 S. Ct. at 2826.

ADL acknowledges that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the single 'dominant' and 'primary' one." *Arlington Heights*, 423 U.S. at 265 (footnote omitted). Here, however, the parties concede that the Georgia legislature was motivated by a single consideration in modifying the second redistricting plan and adopting the third: race. Under the facts of this case, the Court need not engage in any weighing function. *Cf. id.*

On this appeal, the Court is presented with the opportunity to reaffirm and harmonize the standards it has enunciated in its equal protection jurisprudence. Because *Washington* and its progeny make clear that "racially discriminatory purpose or intent is required to show a violation of the Equal Protection Clause," *Arlington Heights*, 429 U.S. at 265, and because *Shaw* makes equally clear that not every

instance of race-conscious state action in redistricting gives rise to an equal protection claim, the analysis adopted by the district court was the proper one. Legislative decisions about redistricting may involve race awareness; it is only when race is *the* substantial or motivating factor in such decisions that strict scrutiny is compelled.

This standard properly erects constitutional protections against state-sponsored racial redistricting classifications that pose the clear danger of significant incursions on individual liberties. The standard allows legislatures to take into account competing considerations (including race) in the creation of voting districts, while at the same time protecting rights guaranteed by the Equal Protection Clause. It assures that racial classifications will not impair the constitutional right to participate in a fair electoral process.

Appellants nonetheless contend that a test of "intent" is unworkable. They claim that the so-called *Shaw* test of "bizarreness" is easier for a district court to apply. *E.g.*, U.S. Br. at 21-22 (courts cannot weigh "various goals the legislature was attempting to achieve" in adopting a particular districting plan, to determine which is "overriding," "predominant" or "most prominent"). This argument is unsupported by precedent or logic.

Courts regularly reach decisions on matters requiring proof of discriminatory intent. In Equal Protection Clause cases and in employment discrimination cases this Court has not hesitated to prescribe procedures, such as techniques of burden-shifting, to be used to evaluate the intent of a corporate or governmental entity. *See, e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Arlington Heights*, 429 U.S. 252; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Washington*, 426 U.S. 229.

Moreover, a fact-finder's determination whether the shape of a district is "bizarre" also is an exercise in subjective weighing. What is "bizarre" is inherently a function of that

factfinder's subjective views.[4] For the purpose of the analysis offered by ADL, whether the shape of the Eleventh District is bizarre or not is of no constitutional import if that shape was determined for a predominantly race-conscious purpose. The constitutional principle is more decisively resolved by asking the right question in the first place: Did a legislature manipulate the composition of the electorate, motivated primarily or substantially by racial considerations?

Appellants have suggested no other principled test; they have advanced no reason, compelling or otherwise, to depart from this strong line of equal protection precedent and the well settled precepts this Court has articulated. Nor have they offered any rationale as to why these compelling authorities should be, either analytically or as a matter of policy, inapplicable to voting or redistricting. Plainly, they are directly apposite.

C. States Must Comport With Equal Protection Principles When Creating Voting Districts.

Shaw recognized that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993) (emphasis in original). However, these differences do not mean that race-conscious redistricting cannot be subjected to the same type of strict scrutiny

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[4] Proof of this proposition may be found in the conflicting submissions made to this Court on this very appeal, in which appellants and *amici* continue to seek rulings on what is, purportedly, a question of fact: whether the Eleventh District is "bizarre." The district court found it unnecessary to reach this point and, ADL submits, this Court need not, should not, and in any principled way, cannot, make such a *de novo* finding on appeal.

accorded other race-conscious state action.[5] It is inconsistent with the purpose of the Equal Protection Clause, and with this Court's past rulings, to immunize a state from complying with equal protection principles because it obtained preclearance from DOJ, where DOJ's requirements themselves violate the Equal Protection Clause.

Here, DOJ's objections to Georgia's first and second plans were not based on a finding that those plans diluted black voting rights or caused retrogression of black voting power. *Cf.* 28 C.F.R. § 51.54(a) (defining "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" as the standard for finding discriminatory effect in redistricting). DOJ objected precisely because the plans failed to *enhance* black voting power to the extent DOJ believed appropriate. 864 F. Supp. at 1365. Yet neither the Voting Rights Act nor the Constitution ensures a right of proportional representation by race. *See Mobile v. Bolden*, 446 U.S. 55, 75 (1980) ("[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation"); 42 U.S.C. § 1973(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

ADL therefore agrees with appellants when, with irrefutable logic, they observe that "[w]hat would otherwise be

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[5] The fact that the Court has tolerated race-specific state action in other social contexts does not alter this conclusion. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (education), *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (employment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (education). The franchise—the manner in which citizens participate in the process of self-government—is fundamentally different from these social concerns. It is fundamentally different precisely because it is the single political right preservative of *all* rights. *Harper v. Virginia St. Bd. of Elections*, 383 U.S. 663, 667 (1966) (referring to "'the political franchise of voting' as a 'fundamental political right, because [it is] preservative of all rights'") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896)).

unconstitutional surely is not made constitutional just because it might have been enacted in response to a DOJ objection." Miller Br. at 28. As this Court observed in *Shaw*, "the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional." 113 S. Ct. at 2831.

Furthermore, to extend the effect of the Voting Rights Act so as to grant states immunity from constitutional restraints when they claim to act pursuant to its supposed dictates is, effectively, to elevate a statute to a position supreme to the Constitution itself. The Voting Rights Act was designed to prohibit racial segregation in the franchise, not to effect it. In sum, it cannot legitimately be argued that a state may exempt itself from conforming to the Constitution by reciting that it violated the Equal Protection Clause in order to comply with a statute.

D. Nothing In *Shaw* Or *UJO* Precludes The Court From Affirming The Holding Of The District Court.

The facts of this appeal are distinguishable from the Court's prior holdings in this area. Precedent guides, but does not dictate, the determination of the vital issues raised herein.

In *United Jewish Organizations of Williamsburg, Inc. v. Carey* ("*UJO*"), the Court held that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." 430 U.S. 144, 161 (1977) (plurality opinion). In *UJO*, the Court upheld without subjecting to strict scrutiny a state's legislative redistricting plan that "deliberately used race in a purposeful manner" to create majority-minority districts in order to comply with Section 5 of the Voting Rights Act. *Id.* at 165. However, there was no claim in *UJO* that the creation of the

state's plan was motivated predominantly or exclusively by race.[6]

In *Shaw v. Reno*, the Court held that, "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. 2816, 2828 (1993). The *Shaw* Court's premise was consistent with the settled proposition that, once a voting district "can be explained only in racial terms," *Wright v. Rockefeller*, 376 U.S. 52, 59 (1964) (Douglas, J., dissenting), it can pass constitutional muster only if it survives strict scrutiny.

Thus, taken together, *UJO* and *Shaw* stand for the proposition that legislatures may consider race among other factors in redistricting, but that when redistricting may be rationally understood only as an effort to segregate the citizenry by race for the purpose of voting, without sufficient justification, a claim lies under the Equal Protection Clause. The Court has never expressed a view—and has explicitly reserved the question—as to whether the intentional creation of majority-minority districts in the absence of a finding of minority dilution or retrogression gives rise to an equal protection claim. *See Shaw*, 113 S. Ct. at 2828. The district court correctly answered this question by holding that where race is the "*substantial or motivating consideration* in creation of the district in question," strict scrutiny is compelled. *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994).

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[6] The *Shaw* Court noted that "nothing in [*UJO*] precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Shaw v. Reno*, 113 S. Ct. 2816, 2830 (1993).

E. *Shaw* Did Not Add A New Requirement—Bizarreness Of Shape—To The Settled Elements Of An Equal Protection Claim.

Appellants, and the dissenting judge in the district court, argue that a *Shaw* claim arises only when racial redistricting motivations result in a bizarrely shaped district, such as the particular district at issue in *Shaw*. Miller Br. at 24-25; *Johnson v. Miller*, 864 F. Supp. 1354, 1395 (S.D. Ga. 1994) (Edmondson, J., dissenting). They suggest that the factfinder must make a subjective assessment of a district's "bizarreness" of appearance in order to satisfy what Judge Edmondson, in dissent, called "a critical part of the cause of action" under *Shaw*. *Johnson*, 864 F. Supp. at 1396 (Edmondson, J., dissenting). They contend that, without such an assessment, "not even a prima facie equal protection claim can be made out." Miller Br. at 24. *Shaw*, however, does not compel such a requirement. Shape may be one, but is not the only, barometer of unconstitutional intent.

Shaw presented a unique set of facts, one of the most prominent of which was a bizarrely shaped voting district. *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993) (citing a description of the shape of the North Carolina plan at issue as resembling a "bug splattered on a windshield"). The *Shaw* Court had no occasion to rule upon the constitutionality of a substantially race-motivated voting district that was *not* bizarrely shaped. This does not compel the peculiar conclusion that a state may segregate its voting population according to race, as long as it does so in geometrically pleasing ways. A state violates the Constitution by intentionally denying its citizens equal protection under the law —not by doing so inartfully.

Properly read, *Shaw* is not confined to the principle that the Equal Protection Clause prohibits only racially segregated districts that are bizarrely shaped. It prohibits *any* legislation that, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to

separate voters into different districts on the basis of race." *Shaw*, 113 S. Ct. at 2832.

Hence, the district court correctly determined that the bizarre shape of a district is not the only means of proving intent to racially gerrymander, or for that matter, the only way to make out a prima facie equal protection claim. Irregular shape is *a* beginning of an equal protection claim; it is *one* indication of prohibited overriding racial intent, but not the only indication. For if a district on its face conforms to traditional redistricting values (including shape), but an intent to racially gerrymander is nevertheless established, by other indicia, to have been the overriding consideration in creating the new district, an equal protection claim nevertheless must lie.

As the court below correctly noted, "the requirement for a successful Equal Protection claim is still *intent*, however proved." *Johnson*, 864 F. Supp. at 1374 (emphasis in original). "Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation" is not consistent with the logic of *Shaw* or with the Equal Protection Clause jurisprudence of the Court. *Id.* An analytical approach that would make district *shape* a threshold to constitutional claims is neither logically sound nor consonant with precedent, and appellants' arguments to the contrary should be rejected.

* * *

ADL acknowledges that effective minority participation in the political process is both necessary and proper and that inexorable advancement toward that goal is a social good that all must endorse. ADL does not believe, however, that we advance toward that objective by doing violence to fundamental constitutional precepts. To sustain Georgia's third plan against equal protection challenge would be to do precisely that.

The Constitution is a procedural prescription and enunciates no value other than the process of representative self-government. That is necessarily the case for any document intended to serve the span of generations. A value that is generally recognized by one generation may not be generally recognized by the next. *Compare Plessy v. Ferguson*, 163 U.S. 587 (1896), *with Brown v. Board of Educ.*, 347 U.S. 483 (1954). It is not this Court's role to elevate even so pressing a concern as electoral proportionality to the level of a constitutional right. It is rather the Court's duty to review such efforts and, ADL submits, to reject them if they do not fall within the procedural confines of the Constitution.

The Court acts with compelling authority when it reviews legislative action, not in order to vindicate specific substantive values, but rather to ensure that the political mechanisms established in the Constitution are kept open and viable—what John Hart Ely calls "policing the process of representation," assessing challenged statutes enacted by popularly accountable legislatures through a process of "a participation-oriented, representation-reinforcing approach to judicial review." John Hart Ely, *Democracy and Distrust* 87 (1980). Neither the access to, nor the effect of, voting can therefore be manipulated by legislatures on the basis of race.

Consistent with these fundamental principles, the district court correctly struck down Georgia's third redistricting plan.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. Creating Congressional Districts On The Basis Of Race Violates Equal Protection Whether Or Not The Districts Are "Bizarre" 4

II. A Racial Gerrymander Is Established When The Plaintiffs Prove That Race Was A Substantial Motivation In The Drawing Of District Lines 12

III. Any Registered Voter Has Standing To Attack A Racial Gerrymander 12

IV. Neither Louisiana Nor Georgia Established A Compelling State Interest For Their Racial Gerrymanders 17

A. The Burden Of Persuasion Rests On The State As To This Purported Justification 17

B. Compliance With The Unauthorized Demands Of The Civil Rights Division Is Not A Compelling State Interest 17

TABLE OF CONTENTS (Cont)

C. Louisiana And Georgia Failed To Demonstrate A Compelling State Interest In Compliance With Section Two of the Voting Rights Act 20

V. Neither Louisiana Nor Georgia "Narrowly Tailored Their Redistricting Plans 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases	Page
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)	12
Board of Education of Kiryas Joel Village School District v. Grumet 114 S.Ct. (1994)	7
Dolana v. City of Tigart, 114 S.Ct. 2309 (1994)	25
Drum v. Seawell, 249 F.Supp 988 (M.D.N.C. 1966)	22
Edmonson v. Leesville Concrete Co., 500 U.S. 614	7
Gomillion v. Lightfoot,, 364 U.S. 339 (1960)	6
Growe v. Emison, 113 S.Ct. 1075 (1993)	20
Hays v. Louisian, 839 F.Supp. (1188)	5,8,9,12,18,28
Heckler v. Matthews, 465 U.S. 728 (1984)	29
Hernandez v. New York, 500 U.S. 352 (1991)	8

TABLE OF AUTHORITIES *(Cont.)*

	Page
Hirabayashi v. United States, 320 U.S. 81 (1943).....	6
Hirabayashi v. United States 828 F.2d, 9th Cir. (1987).....	6
Hunter v. Underwood, 500 U.S. 352 (1991).....	12
J.E.B. v. Alabama ex. rel. T.B. 14 S.Ct. 1419 (1994).....	7
Johnson v. DeGrandy, 114 S.Ct. 2747 (1994).....	18
Johnson v. Miller, 864 F.Supp. 1354 (S.D.Ga. 1994).....	5, 28
Korematsu v. United States, 323 U.S. 214 (1944)	6
Korematsu v. United States, 584 F.Supp. 1406 (N,.D. Cal. 1984).....	6
Loving v. Viginia, 388 U.S. 1 (1967).	6
Northern Florida Contractors v. Jacksonville, 113 S.Ct. 2297 (1993).....	13
Palmore v. Soditi, 466 U.S. 429.....	6

TABLE OF AUTHORITIES (Cont)

	Page
Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).....	5
Powers v. Ohio, 499 U.S. 400 (1991)	6, 7
Reynolds v. Sims, 377 U.S. 533 (1964).....	24
Regents of the Univ. of Calif. v. Bakke, 438 U.Ss. 265 (1978).....	13
Shaw v. Hunt, (No. 94-923) filed Nov. 15, 1994	10, 13, 25
Shaw v. Hunt, 861 F.Supp. (E.D.N.C. 1994).....	10
Shaw v. Reno, 113 S.Ct. 2816 (1993).....	Passim
Thornburg v. Gingles, 478 U.S. 30 (1986).....	20
United Jewish Org. v. Carey. 430 U.S. 144.....	22
Vera v. Richards, 861 F.Supp. 1304 (S.D. Tex.) (1994).....	9,10

TABLE OF AUTHORITIES (Cont)

STATUTES:

2 U.S.C. § 2a..... 19

2 U.S.C. § 2c..... 15

Section 2 of the
Voting Rights Act..... passim

Section 5 of the
Voting Rights Act..... passim

N.C. GEN. STAT
§ 163-111..... 23

28 C.F.R. 51-55(b)..... 18

OTHER:

Note 44 DUKE L.J. 298
1994..... 7

Swain, C. BLACK FACES,
BLACK INTERESTS
(1993)..... 26

Nos. 94-558, 94-627, 94-631, 94-797, 94-929

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF LOUISIANA, *et al.*, *Appellants*
v.
RAY HAYS, *et al.*, *Appellees*

On Appeal from the United States District Court
for the Western District of Louisiana

ZELL MILLER, *et al.*, *Appellants*
v.
DAVIDA JOHNSON, *et al.*, *Appellees*

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF OF RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK, as AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* -- Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy G. Bullock -- are the five North Carolina voters who, in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), attacked that

State's congressional redistricting as a racial gerrymander. After this Court ruled there that they had stated a claim for relief, the three-judge District Court held on remand that they had established a racial gerrymander, but a majority concluded that the State had shown a compelling governmental interest and a narrowly tailored remedy. From that decision they have appealed and filed their jurisdictional statement in this Court. *Shaw v. Hunt*, (No. 94-923). Thus, the *amici* have a continuing interest in assuring that they and other voters are not deprived of equal protection by the use of explicit or implicit racial classifications in the creation of congressional districts.

The *amici*, however, are not surrogates or proxies for any group; nor are they exponents of group rights. Instead they are individuals who -- at their own expense -- have been contesting for three years what they believe to be unwarranted reliance on racial classifications in the election of Representatives to the United States Congress. Because of their extensive involvement in *Shaw*, the *amici* have acquired insights and information which they believe will be helpful to the Court in deciding the present appeals from decisions overturning racial gerrymanders in Louisiana and Georgia. Moreover, the *amici* believe that their brief will assist the Court in evaluating the assertions and argument in the *amicus* brief that the State of North Carolina -- along with Texas -- has submitted in connection with these appeals.

SUMMARY OF ARGUMENT

Since this Court's decision in *Shaw*, desperate efforts have been made to evade or to limit the logical implications of the majority opinion. Indeed, to this end, a calculated campaign of ridicule and invective was initiated against *Shaw* --especially by some of the beneficiaries of the racial classifications whose use the majority opinion denounces.[1]

In like fashion, the appellants and their allies now seek cunningly to minimize the impact of *Shaw* by asking this Court to impose an unwarranted requirement that plaintiffs attacking a racial gerrymander establish the "bizarreness" of the districts involved. Moreover, the appellants erroneously minimize the importance of "traditional districting principles" and treat as irrelevant familiar concepts like "compactness" and "contiguousness".

To justify the egregious racial gerrymanders of Louisiana and Georgia, appellants seek to transmute into a "compelling state interest" the unauthorized expansion of Section 5 of the Voting Rights Act by the Civil Rights Division and the craven capitulation of State officials to

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1 For example, there have been comments that the opinion was concerned with "aesthetics"; and Congressman Melvin Watt -- who represents North Carolina's serpentine, majority-black Twelfth District -- has stated on national television that he believed the assumptions of the majority opinion in Shaw were "racist". *See* Jurisdictional Statement in *Shaw v. Hunt* No. 94-923, p. 7, n.6.

that "power grab" by Federal bureaucrats.[2] To bolster their weak justification of the racial gerrymanders, the appellants seek to turn the burden of persuasion on its head. Then they distort the plain meaning of "narrow tailoring" by extending the concept to encompass the creation of dysfunctional majority-minority districts without full consideration of less disruptive alternatives. Finally, the appellants mistakenly praise their handiwork as a remedy for racial polarization -- when, in fact, it is just the opposite.

ARGUMENT

I. Creating Congressional Districts On The Basis Of Race Violates Equal Protection Whether Or Not The Districts Are "Bizarre".

The complaint which this Court considered in *Shaw* contained allegations that North Carolina's two majority-black districts were "amorphous" (par. 28) and "bizarre" (par. 36A) [3] However -- despite the appropriateness of these two adjectives -- an examination of the entire

2 In the present context, for State officials to rely as a defense on their own acquisition in the unwarranted assertion of authority by the bureaucrats of the Civil Rights Division is the functional equivalent of the "Nuremberg defense" -- and is equally unconvincing.

3 *See* Jurisdictional Statement in *Shaw v. Reno* (No. 92-357) at pp. 88a, 103a.

complaint makes clear that it is premised on the fact that racial classifications were used in creating the congressional districts. *Id.* at 67a, 107a. Nonetheless, the appellants in *Hays* and *Johnson* and their supporting *amici* have attempted to make *Shaw* almost irrelevant by insisting that "bizarreness" of the racially gerrymandered districts is a necessary part of the claim for relief and that -- with the possible exception of the two majority-black districts involved in *Shaw* itself -- there simply are no districts which are so extraordinary as to fulfill this requirement.

This limiting interpretation cannot be reconciled with *Shaw's* own emphasis that, under the Equal Protection Clause, all purposeful racial classifications are subject to strict scrutiny. *See* 113 S.Ct. at 2824-25. According to the Court, equal protection "demands strict scrutiny of all racial classifications". 113 S.Ct. at 2830. Indeed, the Court quotes an earlier pronouncement that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification". *Id.* at 2825, quoting *Personnel* **Adm'r v. Feeney,** ***442 U.S. 256, 272 (1979).***

A half century ago, this Court stated that:

> Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.

Hirabayashi v. United States, 320 U.S. 81, 100 (1943); *see also Korematsu v. United States*, 323 U.S. 214, 216 (1944)("the most rigid scrutiny required").

There the use of such classifications was reluctantly upheld, because of a perceived danger to national security during a declared war; [4] but this Court has never retreated from its hostility to the use of racial classifications [5] -- whether they were overt or concealed. [6] To introduce a requirement that plaintififfs attacking a racial gerrymander

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4 In retrospect, the supposed justification for the exclusion of Japanese-Americans from the West Coast and their internment appears questionable. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal.1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Circuit 1987). This unhappy history illustrates the need for exceptional caution in undertaking the "benign" use of racial classifications.

5 *See e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Palmore v. Soditi*, 466 U.S. 429 (1984); *Powers v. Ohio*, 499 U.S.400 (1991).

6 In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the use of the racial classification was not explicit but was implicit in changing the shape of the City of Tuskegee from a square to a 28-sided figure.

on equal protection grounds must show "bizarreness" of the districts would constitute such a retreat. At the same time, it would unnecessarily require this Court and the lower courts to establish criteria for "bizarreness".

As the Court recognized in *Shaw* (at 2827), a "bizarre" district reminds voters that, with specific governmental approval, racial stereotypes are being relied on in the electoral process. This, in turn, may enhance racial polarization by appearing to bless it. However, the crucial factor is the governmental use of racial classifications to achieve an intended result -- whether or not the voters are fully aware of that use or that result. Indeed, if the Court accepted appellants' contention that proof of "bizarreness" is required, a state legislature's stated purpose to draw district boundaries along racial lines would require no scrutiny, so long as a court was unpersuaded that the districts created were "bizarre". Creating such an exception would be inconsistent with this Court's emphatic disapproval of reliance on racial or gender stereotypes.[7] Moreover, to allow such an

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7 *Powers, supra,* n.5; *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *J.E.B. v. Alabama ex rel T.B.,* 114 S.Ct. 1419 (1994); Note, 44 DUKE L.J. 298 (1994). The Court also has held invalid the use for governmental purposes of boundaries drawn along religious lines. *Board of Education of Kiryas Joel Village School District v. Grumet,* 114 S.Ct. 2481 (1994). Of course, permitting a peremptory challenge or taking other governmental action which has a disparate effect on a particular racial or ethnic group will not violate the Equal Protection Clause when the action is taken for a reason independent of race or

(continued...)

exception would be inconsistent with the rationale for recognizing "the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification". *Id.* at 2830. *See also* Note, 44 DUKE L.J. 298 (1994).

Although not required as an element of the claim for relief under the Equal Protection Clause, "bizarreness" does have an important evidentiary role. As the three-judge District Court recognized in *Hays,* 839 F.Supp. 1188, 1194-5 (W.D.La. 1993) the redistricting map may point unerringly to the racial motivation for the plan being attacked. Indeed, when, during oral argument in *Shaw*, the members of this Court looked at the map of the North Carolina congressional districts, they must have had little doubt as to the underlying purpose. [8]

7(...continued)
ethnicity. *Hernandez v. New York, 500* U.S. 352 (1991).

8 The District boundaries may provide strong circumstantial evidence of a racial gerrymander. However, there may be other types of evidence. For example, there may be statements of legislators -- like those of North Carolina Senator Dennis Winner who, after meeting with Assistant Attorney General John Dunne on December 17, 1991 (the day before North Carolina had been denied Section 5 preclearance), informed his fellow Senators that Dunne wanted "quotas". *See,* Jurisdictional Statement in *Shaw v. Hunt,* No. 94-923 at p.13. Moreover, the heavy-handed tactics of the Civil Rights Division in denying Section 5 preclearance have made clear the racial

(continued...)

In addition to being evidentiary, "bizarreness" of **districts, if present in a plan drawn along racial lines, will be an aggravating factor because it tends to make those districts dysfunctional. Judge Edith Jones described this harm in some detail in *Vera v. Richards:***

> **Traditional, objective districting criteria are a concomitant part of truly "representative" single member district plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can**

8(...continued)

purpose for creating the gerrymandered majority-minority districts. However, the proponents of these districts do their best to obscure the facts with euphemisms. For example, sometimes the term "minority opportunity" district is used in place of "majority-minority". *See e.g.*, the Amicus Brief of the State of Texas at p. 14. Likewise, there sometimes is a failure to make clear that "majority-minority" does not mean that there is no majority of any race but, instead, that it means that a "minority" constitutes more than half the voting age population of a district. Another tool for obscuring the presence of a racial purpose is provided by "*post hoc* rationalizations" --whose use was denounced by the three-judge District Court in *Hays*, *supra* at 1203.

> no longer importune their Congressman and expect their Congresman to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

861 F.Supp. at 1334 n. 43. [9]

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9 Judge Jones added:

As the influence of truly local oroganizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized locala interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles. *Ibid.*

That the harms she described are not imaginary was demonstrated by the evidence in *Shaw v. Hunt*. According to a survey sponsored by the State of North Carolina in the fall of 1993, Representative Melvin Watt was properly identified as their congressman by only 6% of the voters polled in the "bizarre" twelfth district, but 6% believed their congressman was [Senator] Jesse Helms, 8% believed it was [Ninth

(continued...)

The harmful effects that result from "bizarre" congressional districts which often accompany racial gerrymandering tend to contradict any claim by the State that the creation of these districts reflects a "compelling governmental interest". How can a state believe itself "compelled" to create districts which adversely affect participation by voters in the electoral process and their communication with incumbents and challengers?

The presence of "bizarre" districts will also indicate the absence of "narrow tailoring". However, the importance of "bizarreness" for these purposes does not make it an element of the plaintiffs' claim for relief. The assault on the constitutional principle of equal protection, which results from racial gerrymandering, is still an assault, whether or not it is aggravated by the baneful effects of districts which defy traditional districting principles.

9(...continued)
District] Congressman McMillan, and 14% thought that [Sixth District] Congressman Howard Coble represented them. *See*, Jurisdictional Statement in *Shaw v. Hunt* [94-923] at p. 21. According to a newspaper report on November 9, 1994, confusion still persisted about district boundaries at the time of the last election. *Ibid.*

II. A Racial Gerrymander Is Established When The Plaintiffs Prove That Race Was A Substantial Motivation In The Drawing Of District Lines.

In *Hays* the three-judge district court concluded that the plaintiffs need only establish that race was a substantial factor in drawing the congressional district lines. This conclusion is fully supported by such cases as *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) and *Hunter v. Underwood*, 500 U.S. 352 (1991).

In *Johnson*, the district court apparently applied a more rigorous standard -- that race be the predominant factor. In so doing, the court below gave the defendants an undue advantage -- as this Court should now make clear. However, this error was immaterial, for all the evidence made unmistakably clear that the predominant purpose of the Georgia legislature was to create three majority-black districts in order to satisfy the demands of the Civil Rights Division.

III. Any Registered Voter Has Standing To Attack A Racial Gerrymander.

The complaint in *Shaw* alleged that the State defendants had violated the Fourteenth and Fifteenth Amendments by creating congressional districts which

were based on racial classifications. The premise was that such use of race undermined and demeaned the electoral process and thereby injured all registered voters -- including the five white voters who had filed the complaint. The most logical interpretation of the Court's opinion in *Shaw* is that the stigmatic injury resulting from such use of race creates standing for any registered voter. The *Hays* court reached this conclusion. *See* 839 F.Supp. at 1192. Likewise, Judge Phillips found that, as registered voters, the plaintiffs had established their standing in *Shaw v. Hunt,* 861 F.Supp. at 425;[10] and in *Vera*, Judge Jones accepted his analysis. 861 F.Supp. at 1331, n. 38. [11]

Indeed, the objections to standing that have been posed in the present appeals seem to ignore several factors. The rationale for the racial gerrymanders in

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10 In support of standing, the court relied especially on *Regents of the Univ. of California v. Bakke,* 438 U.S. 265 (1978); *Northern Florida Contractors v. Jacksonville,* 1135 S.Ct. 2297 (1993); and *Heckler v. Matthews*, 465 U.S. 728 (1984).

11 In the Jurisdictional Statement in *Shaw v. Reno* (No. 92-357), the plaintiff-appellants presented six questions, of which one concerned the standing of white voters to contest the racial gerrymander. When the Court noted probable jurisdiction, it stated a single question to be argued and briefed. In their *amicus* brief, the States of North Carolina and Texas place emphasis on the absence of any reference to standing in the issue stated by the Court. However, in light of the language of the majority opinion in *Shaw* -- which goes beyond the matters specifically raised in the Court's question -- the States reliance seems misplaced.

Louisiana and Georgia -- just as for the racial gerrymander in North Carolina -- was to assure election of black representatives to Congress to represent the interest of the particular state's African-Americans. The African-American members of Congress, selected from the majority-black districts, are given the special role of representing persons of their racial group -- whether or not those persons reside in the districts from which the African-American representatives are elected. As stated in *Shaw*:,

> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to representing only members of that group rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 2827. [12]

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12 This hypothesis, expressed in *Shaw*, was corroborated by the trial testimony of Congressman Melvin Watt, who represents North Carolina's notorious twelfth district. This testimony "speaks for itself, [*see, e.g., Tr.* pp. 999-1001] representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under or catering,* as you said

(continued...)

The inevitable consequence of the racial **gerrymander is that white voters in the majority-black districts will often feel themselves unrepresented and that black voters in the other districts will have a similar feeling. Moreover, this system of vicarious representation of racial and ethnic groups is at odds with the seeming purpose of 2 U.S.C. § 2c -- which, in requiring that members of Congress be elected from single-member districts, contemplates that the primary duty of each member will be to provide representation to the voters of his district, rather than to the members of his race. Likewise, it contravenes the intent expressed by the disclaimer of proportional representation in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.** [13]

In some of the briefs submitted by appellants and their allies, it has been suggested that the majority-black districts are more "integrated" than any of the other congressional districts. See, e.g., Amicus Brief of Black

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12(...continued)
my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*'] (emphasis added)". *See* 861 F.Supp. at 478. n.5 (Voorhees, Jr. dissenting).

13 If proportional representation is to be allowed, this should be done openly by repealing the single-member district requirement in 2 U.S.C. § 2c and allowing states to use race-neutral electoral systems like cumulative voting or single-transferable votes. To try to blend proportional representation by race with a statutory requirement of single-member districts is so irrational as to raise equal protection issues.

Congressional Caucus in *Johnson*, at 20-22. By this it apparently is meant that a substantial percentage of both whites and African-Americans will reside in the same congressional district. However, this "integration" is achieved by "bleaching" the other congressional districts -- reducing their population of African-Americans.

Furthermore, the purported "integration" of the majority-black district is itself a misnomer. Typically, in order to meet the goal of a "safe" district in which an African-American is almost sure to be elected, a number of black urban concentrations of voters are linked together by splitting precincts or census blocks which are predominantly white in population.[14] Although unnecessary to establish standing, the many collateral ill effects of racial gerrymanders reinforce the standing of white voters to obtain judicial relief from this practice.

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14 North Carolina's two majority-black districts provide the best example of how these "strings of black pearls" may be created with the aid of computer technology. The State contains 229,000 of the approximately 7 million census blocks in the United States; and racial information was available as to each block. Census blocks in which African-Americans resided were linked together by narrow corridors of census blocks in which mostly whites resided. Obviously this technique -- which apparently has also been employed to some extent in Louisiana and Georgia -- discriminates against the white voters because they are more likely than African-Americans to be placed in different congressional districts from the neighbors with whom they share common interests.

IV. Neither Louisiana Nor Georgia Established A Compelling State Interest For Their Racial Gerrymanders.

A. The Burden Of Persuasion Rests On The State As To This Purported Justification.

In *Shaw* the Court observed that the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary". 113 S.Ct. 2832. Consistent with this comment, the burden of persuasion must rest on the State as to any defense that a racial gerrymander is justified by its "narrow tailoring" to satisfy a "compelling State interest" [15] Indeed, to place the burden of persuasion elsewhere would mock the concept of "strict scrutiny".

B. Compliance With The Unauthorized Demands Of The Civil Rights Division Is Not A Compelling State Interest.

In Louisiana, Georgia, and North Carolina, the State legislatures ultimately bowed to the exercise by the Civil Rights Division of its preclearance power under

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15 Moreover, a party usually bears the burden of persuasion as to its affirmative allegations and as to issues on which it must produce evidence. See 9 Wigmore, Evidence, § 2486 (Chadbourne Rev. 1981); 2 McCormick, Evidence, § 337 (4th Ed. 1992).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. That power was being exercised pursuant to the Attorney General's erroneous premise that, under the Voting Rights Act, majority-minority districts must be "maximized". However, as the *Hays* court has emphasized, *see* 839 F.Supp. at 1196-7, n. 21, the Voting Rights Act provides no basis for this policy of maximization; and the disclaimer of proportional representation in Section 2 (the "Dole amendment) indicates a legislative intent to the contrary. *See also*, *Johnson DeGrandy*, 114 S.Ct. 2647 (1994). [16]

Even aside from the obvious abuse of its preclearance authority by the Justice Department, there are several reasons why a state's surrender to that authority does not constitute a "compelling State interest". For one thing, the Attorney General is only empowered to "interpose an objection" -- rather than to make findings of fact. Moreover, no administrative hearing precedes the interposing of an objection; the statute prescribes no standard for the sufficiency of the evidence to justify interposing an objection; and there is no direct judicial review of the Attorney General's action in interposing or

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16 The overextension of its authority by the Civil Rights Division is also reflected in 28 C.F.R. § 51.55 (b), which empowers the Attorney General to deny preclearance even when she concludes that a "submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2."

withholding an objection. To claim that the results of such an informal and wholly discretionary procedure can have the practical effect of negating the equal protection rights of registered voters seems absurd.

The absurdity is compounded by the availability of a judicial remedy under Section 5 itself. If that remedy is utilized, a formal hearing will be conducted and specific findings and conclusions of law will be entered by the three-judge District Court in the District of Columbia. Short of exhausting their judicial remedies, neither Louisiana nor Georgia has a basis for claiming a "compelling State interest" to comply with Section 5.

Admittedly, obtaining judicial relief may cause delay and cost money; however, such delay and expense -- when weighed against the important constitutional rights involved -- are more than tolerable. Moreover, 2 U.S.C. § 2a provides a solution for the short-term problems of delay -- a solution far preferable to that of saddling voters with racially gerrymandered districts until after the next census.

Section 5 specifically provides that neither an objection by the Attorney General, a failure to object, nor a declaratory remedy pursuant to that Section "shall bar a subsequent action to enjoin enforcement of" a redistricting plan. Appellants seek to circumvent that provision by asserting that their desire to comply with

Section 5 is itself a "compelling State interest" which justifies use of the redistricting plan. This evasion should not be tolerated. [17]

C. Louisiana And Georgia Failed To Demonstrate A Compelling State Interest In Compliance With Section 2 Of The Voting Rights Act.

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court announced three requirements for requiring the creation of single-member districts in order to comply with Section 2 of the Voting Rights Act. One of these conditions was "geographical compactness". In *Growe v. Emison*, 113 S.Ct. 1075 (1993), the Court applied the *Gingles* conditions to congressional districts.

When the location of the African-American population in Louisiana and Georgia is considered, it appears that, under *Gingles* and *Growe*, Section 2 would not require Louisiana to have more than one majority-

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17 In their *amicus* brief the States of Texas and North Carolina argue that the recognition of this purported "compelling governmental interest" will help preserve for states a necessary freedom from federal control -- apparently a reference to control by the Federal courts. In the case of North Carolina, at least, it seems odd that the State should be relying in its defense on the State's acquiescence in the unreasonable position of the Department of Justice lawyers, with whom the General Assembly unsuccessfully struggled for months to obtain preclearance of the State's first redistricting plan. North Carolina, should be welcoming judicial intervention now to allow it to use a plan more similar to the one it initially wished to use.

black congressional district and Georgia to have more than two. However, pursuant to its misguided and illegal policy of maximization of these districts, the Civil Rights Division was insisting on two majority-minority districts for Louisiana and three for Georgia. The capitulation of these two states to this insistence is now being justified as a "compelling State interest" -- apparently on the theory that someone might have successfully sued the states for their failure to "maximize".

In view of the lack of "geographic compactness", these purported concerns seem "pretextual" -- to use a favorite term of the Civil Rights Division.[18] However, appellants and their allies would respond that "compactness" is a very relative concept and that Louisiana and Georgia might have more at risk than at first would appear. This argument is overstated. Apparently the Court believed that "geographic compactness" had a clear meaning when it announced the *Gingles* conditions. The term "compactness" has also been

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18 Apparently the State of Georgia itself is not asserting this defense of a "compelling governmental interest" in compliance with Section 2; byt the other appellants explain that this omission is due to other litigation in which Georgia is involved and, therefore, should be disregarded. However, it does seem somewhat odd that Georgia is vigorously disputing allegations of Section 2 violations in other cases, but here is relying on the threat of possible lawsuits against it to justify its infringement on the equal protection rights of its voters by reason of its racial gerrymander.

used by Justices of this Court on another occasion; [19] and presumably they also believed that the term was clear. Moreover, at various times "compactness" has been used in federal and state statutes concerning redistricting and reapportionment.

In short, one must conclude that the alleged uncertainty of "traditional districting principles" and of concepts like "compactness" is much less than appellants would like this Court to believe. As a corollary, it seems clear that the racial gerrymanders in Louisiana and Georgia were not the result of a desire to comply with Section 2 or of the belief that Section 2 dictated the creation of the additional majority-black districts on which the Civil Rights Division insisted. Thus, Section 2 does not give rise to a "compelling State inteest" as contended by appellants.

V. Neither Louisiana Nor Georgia "Narrowly Tailored" Their Redistricting Plans.

As has been previously noted, Louisiana and Georgia have the burden of persuading the factfinder that

19 *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) ("employing sound districting principles, such as *compactness* and population equality") (emphasis supplied). *See also, Drum v. Seawell*, 249 F.Supp. 988 (M.D.N.C) (1966) (three-judge court) (requiring "compactness" and "contiguousness" in a congressional redistricting plan)..

their plans were "narrowly tailored". At the very least, this would require a showing that there was a consideration of other alternatives to the creation of majority-black districts.[20] Furthermore, if these States were to create majority-minority districts, narrow tailoring would require that, to the greatest extent possible, these districts be drawn pursuant to "traditional districting principles". There is little indication that any effort was made along these lines; and certainly there is no showing that some of the majority-minority districts could not have been made more compact. Certainly if a state seeks to defend its racial gerrymandering on the ground of "narrow tailoring" to meet a "compelling State interest" it should be required to show that it exerted its best effort to minimize the disruption that resulted from its purported need to meet its "compelling State interest". Neither Louisiana nor Georgia have made any such showing.

In *Shaw v. Hunt* the majority, over Judge Voorhees' strong objection, seemed to take the position that if it were necessary to create a majority-minority

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20 One such alternative might be to provide that a second primary would not be necessary if the leader in the first primary received more than a prescribed percentage of the votes cast. *Cf.* N.C.G.S. § 163-111. Also, if there were no restrictions on voting in a party primary by voters not registered as members of that party, imposition of such a restriction might be considered. Apparently measures of this type were not considered as a possible way to meet whatever State interest was believed to require the creation of majority-black districts.

district, then the Court should not review how that district was drawn. In *Vera*, Judge Edith Jones cogently takes issue with this approach, 861 F.Supp at 1343-44, n.55. As she points out, in *Shaw* the Court observed that the deliberate creation of majority-minority districts to remedy past discrimination was only constitutionally permissible beyond the framework of the Voting Rights Act if the State employed sound districting principles and if the racial groups' residential patterns permitted the creation of districts, *see* 113 S. Ct. at 2832. Her logic is persuasive that "these statements bear importantly on the 'fit' between the state's compelling interest in addressing Voting Rights concerns and the form of the districts that must be narrowly tailored to suit them". *Ibid.* Under Judge Jones' rationale -- which conforms to the plain meaning of "narrow tailoring" -- "a racially constructed district must satisfy other neutral districting criteria". *Ibid.* [21] Neither Louisiana nor Georgia have made any such showing.

The rationale of "narrow tailoring" would also seem to require that there be some nexus between the placement of majority-black districts and the past discrimination which is supposed to justify the remedial

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21 The importance for constitutional purposes of having legislative districts which have rational boundaries seems to have been assumed by the Court in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

action. [22] In *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994), the Court held that when property is taken for a public purpose due process requires "essential nexus", "rough proportionality", and "individualized determination". In the context of equal protection, "narrow tailoring" would seem to demand a somewhat similar showing -- especially that an "individualized determination" was made as to whether a majority-minority district was necessary, what percentage of minority persons was necessary to achieve the required result, and where the boundaries of the district could be located with minimum disruption to voter participation and competition in the political process. Neither Louisiana nor Georgia came anywhere near meeting such requirements.

CONCLUSION

When all is said and done, the basic argument which appellants and their allies advance in support of the majority-black districts in Louisiana and Georgia is that, after Reconstruction, African-Americans were not elected to Congress from Southern states and it is necessary now to make up for past sins. However appealing this

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22 Such a nexus was notably absent in North Carolina's congressional redistricting plan, for there was little effort -- especially with the snakelike Twelfth District -- to relate the district boundaries to the counties which were subject to preclelarance because of past discrimination. Indeed, in the Twelfth District the percentage of registered black voters was higher than the percentage of white voters. *See* Jurisdictional Statement in *Shaw v. Hunt*, No. 94-923 at 24.

argument may seem at first glance, it has many defects.

For one thing, the cure may be as bad as the disease; the majority-minority districts tend to breed resentment on the part of whites and thereby increase the racial polarization they are intended to reduce. Moreover, they reduce the incentive to form multi-racial coalitions of voters. Even more important, however, their creation signifies a retreat from the ideal of a color-blind society and a new emphasis on "descriptive representation", rather than "substantive representation".[23]

Secondly, the majority-minority districts are premised on racial stereotypes; and these stereotypes are becoming increasingly inaccurate. Thus, the black community is no longer as monolithic as it may have seemed at one time. White voters seem to have recognized this fact and have been willing to consider black candidates in terms of their individual views -- rather than in terms of stereotypes. Significantly, two blacks -- J.C. Watts and Gary Franks have been elected to Congress in the recent past from overwhelmingly white congressional districts; but, unlike the African-Americans

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23 In her recent book about the representation of black interests in Congress, Carol Swain, an African-American political scientists, makes the important distinction between "descriptive representation:" of black voters -- their representation by black officeholders -- and "substantive representation" -- their representation by persons of whatever race who advance the interests of black voters. *See*, Swain, BLACK FACES, BLACK INTERESTS, P. 5 (1993).

elected from majority-minority districts, these representatives are Republicans.[24]

Furthermore, the absence of black officeholders in past years may be somewhat misleading. In this connection a comparison is in order. Women in the United States did not have a constitutional right to vote until the Nineteenth Amendment was ratified in 1920. Since then the candidacy of women for political office has increased significantly, but there are still relatively few women in the Congress. However, an extensive survey recently released by the National Women's Political Caucus shows that when women have run for public office, they have been successful to the same extent as men. Similarly, the significantly lower percentage of black elected officials than white may not be attributable solely to race but also to many other factors -- such as fewer candidates, less financial support, and the well-entrenched position of some white incumbents.

Whatever the cause may be, the use of majority-minority districts to increase the number of African-Americans in the Congress should be approached cautiously and every effort must be made to find other

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24 The increased openness of the American electoral process is also evidenced by the fact that currently a Native-American serves in the Senate from Colorado and that some years ago a Japanese-American was elected to the Senate from California -- the State where Japanese-Americans were interned during World War II. *See Korematsu v. United States, supra.*

alternatives. Clearly neither Louisiana nor Georgia made such a search for alternatives; and even though this failure may have been in part attributable to the coercive and misguided tactics of the Civil Rights Division, that is not an adequate excuse for depriving the Plaintiff-Appellees of their equal protection right to vote in congressional districts whose boundaries are nowdrawn on the basis of racial classifications. In both *Hays* and *Johnson*, the judgments of the Court below should be affirmed.

Respectfully submitted,

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March 15, 1995

Nos. 94-631, 94-797 and 94-929

IN THE

Supreme Court of the United States

October Term, 1994

ZELL MILLER, *et al.*,

Appellants,

and

UNITED STATES OF AMERICA and
LUCIOUS ABRAMS, JR., *et al.*,

Appellant-Intervenors,

versus

DAVIDA JOHNSON, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District of Georgia

MOTION AND BRIEF OF
THE NATIONAL VOTING RIGHTS INSTITUTE
AS *AMICUS CURIAE* SUPPORTING
THE APPELLANTS

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Nos. 94-631, 94-797, and 94-929

In the Supreme Court of the United States
October Term, 1994

Zell Miller, et al. (Appellants)
and
United States of America and
Lucious Abrams, Jr., et al.
(Appellant-Intervenors)
versus
Davida Johnson, et al. (Appellees)

MOTION OF THE NATIONAL VOTING RIGHTS INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN FAVOR OF APPELLANTS

Amicus National Voting Rights Institute is a non-profit litigation and public education organization formed to challenge the power of private wealth in the American political process. The Institute takes the position that majority-minority districts created under the Voting Rights Act amendments of 1982 are the principal points of access to Congress for poor and working-class Americans. *Amicus'* brief presents several central arguments not presented in either the petition in the

instant case or the briefs in Hays v. Louisiana.

All parties other than the appellees have consented to the filing of this brief. Appellees have indicated to *amicus* that they will not object to the filing of this brief; they declined to grant *amicus* affirmative permission simply out of a concern that the volume of briefs submitted would be too great, preferring to leave to this Court's discretion the decision whether to grant *amicus* permission to file.

Respectfully submitted,

February 21, 1995

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE DISTRICT COURT MISAPPLIED THE "SUBSTANTIAL OR MOTIVATING FACTOR" TEST 5

A. The District Court Failed To Recognize That The Substantial Or Motivating Factor Test Is Only A Threshold *Prima Facie* Inquiry 5

B. The District Court Mistakenly Inquired Whether Race Constituted "The" Substantial Or Motivating Factor, Rather Than "A" Substantial Or Motivating Factor 13

II. THE DISTRICT COURT ERRED IN APPLYING THE "SUBSTANTIAL OR MOTIVATING FACTOR" STANDARD RATHER THAN THE MORE STRINGENT "OBVIOUS PRETEXT" STANDARD 19

A. The District Court Correctly Recognized That Appearance Serves Two Functions In The Racial Gerrymandering Inquiry 20

B. Earlier Decisions Relied On Individual And Group Harms To Satisfy Article III's Injury-In-Fact Requirement . . . 22

C. Shaw Recognizes A New Class Of Social Harms, Which Are Caused By Racial Classifications, Not Standard Facially Neutral Measures 24

D. Shaw Recognizes That Some "Rare" Cases Will Involve Facially Neutral Measures That Are "obvious pretext[s] for racial classification" . . 31

1. The district court overemphasized the importance of shape as an independent factor 33

2. Shaw's emphasis on "appearance" equates with the need for district lines to mirror racial lines . . . 36

3. The district court's test for appearances was not sufficiently demanding 39

4. The facts found by the district court do not support the conclusion that District Eleven is an obvious pretext for racial classification 44

III. SWEEPING DISSOLUTION OF MINORITY DISTRICTS WILL DISADVANTAGE MINORITY CANDIDATES BY FORCING THEM TO RUN IN MAJORITY-WHITE DISTRICTS AGAINST CANDIDATES WHO ARE ABLE TO RAISE AND SPEND FAR MORE MONEY, A FACTOR WHICH IS KEY TO VICTORY 46

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. XIV . . . . . passim

Supreme Court Decisions

Alexander v. Louisiana, 405 U.S. 625 (1972) 8

Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 253 (1977) passim

Bullock v. Carter, 405 U.S. 134 (1972) 58

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 23, 28

Davis v. Bandemer, 478 U.S. 109 (1986). 34

Fullilove v. Klutznick, 448 U.S. 448 (1980) 28

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 34

Harper v. State Bd. of Elections, 383 U.S. 663 (1966) 59

Hirabayashi v. United States, 320 U.S. 81 (1943) 25

Hunter v. Underwood, 471 U.S. 222 (1985) 8, 10, 11

Local 28 of the Sheet Metal Workers' Int'l Assn. v. EEOC, 478 U.S. 421 (1986) 28

Lujan v. Defenders of Wildlife, 112

S. Ct. 2130 (1992) 22

Metro Broadcasting v. FCC, 497 U.S. 547 (1990) 28

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) . . . . . passim

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297 (1993) 22

Palmore v. Sidoti, 466 U.S. 429 (1984) 28

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 32

Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) 28

Reynolds v. Sims, 377 U.S. 533 (1964) 42

Shaw v. Reno, 113 S. Ct. 2816 (1993) . . . . . passim

United States v. Paradise, 480 U.S. 149 (1987) 28

Washington v. Davis, 426 U.S. 229 (1976) . . . . . passim

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 28

Wright v. Rockefeller, 376 U.S. 52 (1964) 42

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 28

Lower Court Decisions

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga.) (per curiam; 2-1 decision), stay granted, 115 S. Ct. 36 (1994), and prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797, 94-929) . . . . . passim

United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987) . . 11, 15

Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) 11

Secondary Authorities

Almanac of American Politics (1994) . 47

Chandler Davidson & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation," in Quiet Revolution in the South 335 (Lisa Handley & Bernard Grofman eds., 1994) 47

Richard A. Epstein, "Caste and the Civil Rights Laws," 92 Mich. L. Rev. 2456 (1994) 52

Thomas C. Goldstein, Note, "Unpacking & Applying Shaw v. Reno," 43 Am. U. L. Rev. 1135 (1994) . . . . . passim

Bernard Grofman, et al., Minority Representation and the Quest for Voting Equality (1994) 46

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Stephen Loffredo, "Poverty, Democracy and Constitutional Law," 141 U. Pa. L. Rev.

1277 (1993) 52

Press Release, "Median Net Worth of Nation's Households Dropped 12 Percent Between 1988 and 1991" (Jan. 26, 1994) 53

Jamin Raskin & John Bonifaz, "Equal Protection and the Wealth Primary," 11 Yale L. & Pol'y Rev. 273 (1993) . . . 48, 49

Jamin Raskin & John Bonifaz, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections," 94 Colum. L. Rev. 1160 (1994) 50, 51

Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno," 92 Mich. L. Rev. 483 (1993) 35

The Citizen Participation Project, 1992 Survey: Summary of Findings (1992) . 52

"Wilson Victory at Ballot Box Matched Fund-Raising Efforts," San Fran. Examiner, Feb. 4, 1995 50

INTEREST OF *AMICUS CURIAE*

The National Voting Rights Institute is a non-profit litigation and public education organization formed to challenge the power of private wealth in the American political process. The Institute promotes the theory that the current regime of financing congressional campaigns --partial public financing for incumbent campaigns through the franking privilege and other subsidies and a private market for contributions dominated by big-money interests--is inconsistent with the requirements of equal protection. The Institute takes the position that majority-minority districts created under the Voting Rights Act amendments of 1982 are the principal points of access to Congress for poor and working-class Americans.

SUMMARY OF ARGUMENT

This brief concerns Shaw v. Reno, 113

S. Ct. 2816 (1993), as applied in Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga.) (per curiam; 2-1 decision), stay granted, 115 S. Ct. 36 (1994), and prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797, 94-929). Its first two sections address the district court's determination that Georgia's Eleventh Congressional District constitutes a racial gerrymander. It does so in large part by applying the theory developed in Thomas C. Goldstein, Note, "Unpacking and Applying Shaw v. Reno," 43 Am. U. L. Rev. 1135 (1994) [hereinafter Goldstein Note].

Initially, *amicus* assumes *arguendo* that the district court was correct to apply the "substantial or motivating factor" test drawn from Washington v. Davis, 426 U.S. 229 (1976), and its progeny. In applying the test, however, the court committed two clear errors. First, it failed to treat the standard as simply

threshold *prima facie* inquiry, and thereby applied an insufficiently rigorous test of racial motivation. Second, the district court without foundation significantly modified the test, inquiring whether race was "the" substantial or motivating factor in the district's construction.

Amicus next argues that the district court erred in even applying the substantial or motivating factor standard. That test guages racial motivation in challenges to *race-neutral* statutes. Shaw's concern, however, is with *racial classifications*, which by their very existence cause social harms. Such classifications exist only when they are motivated solely by race.

The district court also erred in overstating the importance of district shape, elevating this factor to constitutional dimensions. Instead, the district court should have inquired whether

the district's boundaries principally mirrored racial-geographic lines, in effect dividing up the electorate according to race. Any other approach departs from the careful language of Shaw, which focuses on whether the only way to understand district lines is as an effort to segregate voters in apartheid fashion.

In the final section of this brief, *amicus* explains that unless the Supreme Court overrules the egregious doctrinal errors made by the district court, the nation could face the loss of many--if not most--majority-minority congressional districts. This outcome would force today's minority Representatives into majority-white districts where they will face extremely long electoral odds, not just because of white voters' traditional reluctance to pull the lever for non-whites, but because white candidates consistently collect more money and more campaign con-

tributions than minorities. Because money is a critical factor in electoral outcomes, minority politicians would obviously lose a great deal of ground. This Court should refrain from dismantling meaningful political opportunities for minority candidates and voters in this way, all in the name of equal protection.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE "SUBSTANTIAL OR MOTIVATING FACTOR" TEST

A. The District Court Failed To Recognize That The Substantial Or Motivating Factor Test Is Only A Threshold *Prima Facie* Inquiry

Essential to the district court's opinion was its view that "Shaw is premised on the uncontroversial proposition that race-based redistricting should be treated like any other race-based legislation." Miller, 864 F. Supp. at 1369. Accordingly, the district court relied on

Washington v. Davis as interpreted by Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), to articulate the standard by which racially motivated redistricting is to be judged:

> After Washington v. Davis, intent is an indispensable element of successful discrimination claims under the Fourteenth Amendment. . . . The Supreme Court has expounded on this intent requirement, holding that the Fourteenth Amendment is violated when race is a "substantial" or "motivating" factor in legislative decision-making.

864 F. Supp. at 1372 (citing Arlington Heights, 429 U.S. at 265-66, as "clarifying Washington v. Davis"; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

The district court was correct that Shaw applied Davis' purpose requirement to racial gerrymandering claims. Shaw is a Fourteenth Amendment case. Accordingly, Justice O'Connor's opinion is directed at "deliberate," 113 S. Ct. at 2823 (citation

omitted), and "purposeful[]," id. at 2824 (citing Davis), "effort[s]," id. at 2832, of the State.[1] The district court committed clear constitutional error, however, by misunderstanding and misapplying the standard articulated in Washington v. Davis and its progeny.[2]

The court's error was in using the "substantial or motivating factor" test as the ultimate gauge of equal protection violations. Specifically, the district court failed to understand that the Davis test is only a *prima facie* standard; the ultimate inquiry is far more stringent,

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[1]See also id. at 2819 (noting that case involved "race-based state legislation designed to benefit members of historically disadvantaged racial minority groups" (emphasis added)); id. at 2824 (recounting plaintiffs' allegation that "the State engaged in unconstitutional racial gerrymandering," which was "deliberate segregation" (emphasis added)).

[2]This section addresses only whether the district court correctly interpreted Davis and its progeny. Amicus argues infra, however, that the Davis standard is not the correct test by which Shaw claims should be evaluated. See infra Part II.

and requires that after a *prima facie* case is made out, the State be given the opportunity to prove that the same decision would have resulted absent the racial factor. This conclusion is inescapable from a reading of a quartet of this Court's precedents: Davis, Arlington Heights, Mt. Healthy, and Hunter v. Underwood, 471 U.S. 222 (1985).

Initially, as the district court recognized, Davis made clear that the critical inquiry is into the State's purpose. 426 U.S. at 242. However, Davis also outlined a process for that inquiry whereby "[w]ith a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" Id. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632

(1972)). What Davis did not do was announce the degree of proof necessary to make out a *prima facie* case.

That ambiguity was resolved through a pair of cases decided the next year. In Arlington Heights, the Court inquired whether race was a "motivating" factor. 429 U.S. at 265-66. In Mt. Healthy, a unanimous Court articulated a parallel inquiry as whether race was a "substantial" factor. 429 U.S. at 285. Mt. Healthy made clear again, however, that this was only a threshold *prima facie* standard:

> We are thus brought to the issue whether . . . the fact that the protected conduct played a "substantial part" . . . would necessarily amount to a constitutional violation . . . . We think that it would not.
>
> . . .
>
> Initially, . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone

> on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.

Id. at 285-87 (footnote omitted).

The opinions in Davis, Arlington Heights, and Mt. Healthy were brought together by a unanimous Court in Hunter v. Underwood.[3] Underwood reviewed a court of appeals opinion that had initially inquired whether the plaintiffs had "'prove[n] by a preponderance of the evidence that racial discrimination was a substantial or motivating factor.'" 471 U.S. at 225 (quoting 730 F.2d at 617). With that burden met, the plaintiffs would "'prevail unless the [defendants] prove[d] by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.'"

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[3] See also infra note 8 (discussing this Court's rationale in Underwood).

Id. (quoting 730 F.2d at 617). This Court unanimously affirmed, ruling that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Id. at 228.[4] The Court in Underwood went on to formulate that same test as whether race was a "but for" motivation for the State's action. Id. at 232.

The district court's failure to conduct the full two-part inquiry justifies reversal for two reasons. First, by definition, the incomplete standard applied by the district court is less rigorous than the actual test required by this Court's precedents; plaintiffs' proof of substan-

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[4] See also United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986).

tial racial motivation merely creates the *inference* of unconstitutional conduct. The State is then given the opportunity to defeat that inference. Leaving the Court's *prima facie* framework in place while affirming the district court's opinion, which is based on the less demanding standard, would have the perverse result of making Shaw claims easier to establish than *any other* challenge to racially motivated legislation. This is paradoxical given the historical purposes of the Fourteenth Amendment, and clearly antithetical to Shaw's admonition that racial gerrymandering claims will "rare[ly]" be proven. 113 S. Ct. at 2825.

Even more alarming, affirming the decision below has the potential to greatly disturb, if not *sub silentio* overrule, the traditional Davis framework. The district court believed that it was faithfully applying the requirements of Davis and its

progeny; the court made no distinction between its own analysis and conducting a *prima facie* inquiry in discrimination cases not involving Shaw claims. If this Court affirms, it will indicate, contrary to Arlington Heights, Mt. Healthy, and Underwood, that a Fourteenth Amendment violation is established merely on proof of substantial racial motivation. There is no justification for such a radical doctrinal reversal.

B. The District Court Mistakenly Inquired Whether Race Constituted "The" Substantial Or Motivating Factor, Rather Than "A" Substantial Or Motivating Factor

The district court's opinion gives the impression that it may have realized the effect of its error, if not the cause.[5] Apparently recognizing that this

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[5]The court apparently concluded that a somewhat more rigid standard was necessary given the constant race-based requirements of the Voting Rights Act. In its view, if only "a" substantial factor were required, nearly all reapportionments would be subject to strict scrutiny review. 864 F. Supp. at 1373. It is not at all clear why a

Court's "a substantial or motivating factor" standard, standing alone, does not comport with Shaw's stringent requirements, the district court subtly attempted to compensate for its mistake by modifying the test. Citing no authority, the court took the position that race must be "*the* 'substantial' or 'motivating' factor behind a voting district," 864 F. Supp. at 1373 (emphasis added), to trigger strict scrutiny review.

The reason the court invoked no authority for this proposition is clear: none exists. In the Fourteenth Amendment context, no reported Supreme Court or

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statutory framework, standing alone, would affect the constitutional standard of review. That point is made in Shaw itself, which holds that Voting Rights Act compliance is relevant only once strict scrutiny is applied. 113 S. Ct. at 2830.

Ultimately, the district court was correct that a more stringent standard should be applied, though it chose the wrong standard for the wrong reason. The "obvious pretext" standard is the one mandated by Shaw, and it applies because of the nature of the plaintiff's injury, not the requirements of the Voting Rights Act. See infra Part II.

Court of Appeals decision has *ever* held that race must be *the* substantial or motivating factor. Compare id. with e.g., United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987) ("[T]he plaintiff need not show that the decision-maker was motivated solely, primarily, or even predominately by concerns that were racial . . . . Rather, the plaintiff need begin only by showing that race was "*a* motivating factor." (emphasis in Circuit Court opinion)). The same is true of the district court's further explanation of its test, that "race was the most prominent element driving the legislature's planning," 864 F. Supp. at 1372 n.19. No reported federal court decision had ever before taken that view.

More than an innovation, the district court's test contradicts settled law. The Arlington Heights inquiry into "a motivating factor" is by definition less strin-

gent than determining if race was "the most prominent" factor. "A" and "the" cannot equate in this context. It is a contradiction in terms to evaluate whether race was "a" "most prominent" factor; there can only be one *most* prominent factor.[6]

As with the district court's failure to properly integrate the *prima facie* framework, affirming its interpretation of the Davis standard would have substantial collateral effects on this Court's Fourteenth Amendment jurisprudence. From this point forward, a *prima facie* case of race discrimination would require that race be "the most prominent," rather than "a motivating," factor. This would dramatically "ratchet up" the level of proof required of plaintiffs, pre-empting *prima facie*

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[6]See Webster's Third New Unabridged International Dictionary 1474 (1986) (defining most as "the greatest of : the majority of").

Fourteenth Amendment claims where race is "one motivation among others of equal strength," id.[7]

The district court's approach would also unsettle the ultimate standard applied to race claims. How is a *prima facie* requirement that race be "the" substantial factor distinct from the inference created that race was a "but for" motivation? In fact, it is not difficult to conceive of circumstances in which race is a "but for" motivation, in that the challenged act would not otherwise have occurred, but is not "the most prominent" motivation, in that several factors of

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[7]Amicus urges that Shaw-type cases be decided under the obvious pretext standard, which is more stringent than that required by Davis and its progeny. See infra Part II. Therefore, unlike the district court's opinion, amicus' view would not have negative collateral effects on Fourteenth Amendment jurisprudence, as it is does not claim to overlap with or apply the test articulated in Arlington Heights and Mt. Healthy.

equal strength contributed.[8] In this sense, the *prima facie* requirement is perversely more demanding than the inference it ostensibly creates.[9]

Apart from profound inconsistencies with this Court's precedents, the decision

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[8]For example, Underwood involved a Fourteenth Amendment challenge to section 182 of Alabama's Constitution. Voters challenged a provision that disenfranchised persons convicted of crimes involving "moral turpitude" on the grounds that it had the purpose and effect of discriminating against blacks. 471 U.S. at 222. This Court unanimously rejected the State's defense "that the real purpose behind § 182 was to disenfranchise poor whites as well as blacks." Id. at 230. "[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but for' motivation for the enactment of § 1982." Id. at 232. Therefore, the Court concluded that while discrimination against blacks was not necessarily the "most prominent" motivation, in that discrimination against poor whites was just as important, it was still a "but for" motivation.

[9]This Court should be hesitant to attribute the difference between the Davis standard, correctly applied, and the standard applied below to a hypothetical effort by the district court to mold the Davis test to the Shaw context. The district court truly believed that it was correctly applying Davis. See 864 F. Supp. at 1373 ("A Shaw claim is an Equal Protection claim; if the Supreme Court were drastically narrowing the Fourteenth Amendment intent requirement articulated in Washington v. Davis and subsequent decisions--specifically for a subset of voting rights cases--it would have said so.").

below should be vacated based on its ambiguity. There is no way of determining what standard the district court ultimately applied. As noted above, there are references to race being both "a" and "the" motivating factor. The court's only effort at describing the test in more detail, set out in a footnote, leaves a cavernous gap between two possible extremes: Race may not be "the most prominent element" but may be "one motivation among others of equal strength." Id. What treatment should be given to racially motivated acts between those two standards is left unexplained.

II. THE DISTRICT COURT ERRED IN APPLYING THE "SUBSTANTIAL OR MOTIVATING FACTOR" STANDARD RATHER THAN THE MORE STRINGENT "OBVIOUS PRETEXT" STANDARD

Part I, supra, criticized the district court's misapplication of the "substantial or motivating factor" test. That discussion assumed *arguendo* that the ap-

proach developed through Washington v. Davis and its progeny indeed governed this case. In this Part, however, *amicus* challenges that premise, contending that courts should instead evaluate racial gerrymandering claims according to the substantially more rigorous "obvious pretext" standard.

A. The District Court Correctly Recognized That Appearance Serves Two Functions In The Racial Gerrymandering Inquiry

A major focus of Shaw v. Reno is appearance,[10] a characteristic that, as the district court recognized, serves double duty in racial gerrymandering claims. "Yes, appearances do matter, but in two extremely particular ways: (1) as a proxy for direct evidence of the legislature's intentions, and (2) as a harm

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[10]Importantly, "appearance" is not limited to district shape; it involves the totality of the publicly perceived circumstances. See infra Part II-D.

adequate to meet the constitutional criteria for standing to sue." Id. at 1370.[11]

From that solid foundation, however, the district court erred by reasoning that the dual function of appearance meant that a separate inquiry must be conducted into each function. As to "the legislature's intentions," id., the court applied the "substantial or motivating factor" test. As to harms, however, it conducted an independent and unrelated inquiry into the shape of the district.[12] By bifurcating its review, the district court failed to

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[11]Whether a racial gerrymandering claim can ever be sustained based purely on direct evidence of legislative intent (i.e., without any basis in outward appearance) is addressed in Goldstein Note, supra, at 1165-70.

[12]Amicus acknowledges the district court's statement that "[i]f the shape of the district advertises 'disregard' for [traditional districting principles] in favor of race-based line drawing, the district is a racial classification." Id. at 1369. Unfortunately, however, the district court never applied the facts of the instant case to that standard. Additionally, it is a correct statement of the law only if the court meant a nearly single-minded focus by the phrases "disregard" and "in favor."

realize that both functions of appearance are directly tied to the government's use of race. That error is clear from a review of the various harms cognizable under the Fourteenth Amendment.

B. Earlier Decisions Relied On Individual And Group Harms To Satisfy Article III's Injury-In-Fact Requirement

As this Court explained in Lujan v. Defenders of Wildlife, under Article III's case-or-controversy requirement, one "irreducible constitutional minimum of standing" is that "the plaintiff must have suffered an 'injury in fact.'" 112 S. Ct. 2130, 2136 (1992). Accordingly, in the Fourteenth Amendment context, a cause of action does not arise every time the government enacts legislation based in part on racial considerations; purpose alone is not enough.[13] For example, as Shaw reaf-

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13 Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301-02 (1993).

firms, facially neutral race-conscious measures may be challenged when they putatively cause a cognizable individual or group harm.

The prototypical individual-rights case in this context is Davis itself, 426 U.S. 229 (1976), cited in Shaw, 113 S. Ct. at 2824 (not contesting plaintiffs' allegation that African-Americans disproportionately failed police entrance exam). Shaw also cites group-rights cases with approval, acknowledging that "schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose *and have the effect* of diluting minority voting strength." 113 S. Ct. at 2823 (emphasis added). Explicit classifications could, of course, be challenged before Shaw as well. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (recognizing injury to white contractor from affirmative action program).

C. Shaw Recognizes A New Class Of Social Harms, Which Are Caused By Racial Classifications, Not Standard Facially Neutral Measures

The major jurisprudential innovation in Shaw was that this Court for the first time announced that no independent injury-in-fact was required to challenge explicit racial classifications[14] which *by their*

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[14]Shaw does not stand for the broader proposition that *all* racial classifications cause social harms. To do so would eliminate any requirement that the plaintiffs establish an individual or group injury in fact. That holding would reverse Northeastern Contractors, decided just two weeks before Shaw. Northeastern Contractors held that, in a challenge to an affirmative action program, Article III's injury-in-fact requirement was satisfied by "the denial of equal treatment resulting from the imposition of the barrier." 113 S. Ct. at 2303.

What makes Shaw and Northeastern Contractors consistent is the different nature of the challenged programs. Shaw involved a reapportionment plan that directly affected the representation of tens and hundreds of thousands of the State's voting citizens. According to the Court, its effects "threaten[ed] to undermine our system of representative democracy." 113 S. Ct. 2828. The program in Northeastern Contractors, on the other hand, was far more limited; only 10% of Jacksonville, Florida's city contracting was at issue. The far more extensive application of the reapportionment scheme therefore generated social harms, while the limited affirmative action program did not.

mere existence, cause social harms.[15] "*Classifications of citizens* solely on the basis of race 'are *by their very nature* odious to a free people whose institutions are founded upon the doctrine of equality.'" 113 S. Ct. at 2824 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (emphasis added)). In the racial gerrymandering context, classifications "reinforce[] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." Id. at 2827.[16]

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[15]See generally Goldstein Note, supra, at 1138-45, 1153-57. Perhaps just as important was this Court's statement that Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." 113 S. Ct. at 2824 (emphasis added). It is therefore irrelevant that a reapportionment does not discriminate against any individual or group.

[16]See also id. (explaining that racial gerrymandering makes "elected officials . . . more likely that their primary obligation is to represent only the members of that group, rather than their constituency as a whole").

The crucial distinction made in Shaw, but missed by the district court below, is therefore between facially neutral race-conscious legislation (with individual or group harms) on the one hand, and racial classifications (with social harms) on the other. Thus, while the district court read Shaw to require that "race-based redistricting . . . be treated like any other race-based legislation," 864 F. Supp. at 1369 (emphasis added), it mistakenly equated that standard with Davis and its progeny, holding that "[t]he proper interpretation of Shaw v. Reno's 'race-based' requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question," id. at 1372 (emphasis

in original).[17] Shaw, in fact holds that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' demands the same close scrutiny that we give other state laws that *classify citizens by race.*" 113 S. Ct. at 2825 (citation omitted; emphasis added).[18]

This is no mere choice among synonyms. Without exception, at the very least since Washington v. Davis, every time that this Court has discussed a "racial classification," it has been referring to the explicit, open, and publicly acknowledged categorization of individuals

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[17]The district court thus incorrectly concluded that a racial classification is established upon proof of substantial racial motivation. See text accompanying this note; 864 F. Supp. at 1369 (equating "race-based legislation" with "racial classifications").

[18]Thus, Shaw identifies racial gerrymanders as "racial classifications with respect to voting." Id. at 2832; see also id. at 2830 (comparing racial gerrymanders with "other kinds of racial classification").

on the basis of race.[19] Facially neutral measures of the kind addressed in Davis and Arlington Heights have *never* been included under that rubric.[20] It is therefore not surprising that Shaw never invokes the "substantial or motivating factor" test of Arlington Heights and Mt. Healthy.[21]

Blurring this distinction would overrule a substantial proportion of this

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[19]Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (preference in broadcasting licenses); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (minority contracting set-aside); United States v. Paradise, 480 U.S. 149 (1987) (police hiring quota); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (union membership quota); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (layoff preference); Palmore v. Sidoti, 466 U.S. 429 (1984) (child custody decision); Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority business enterprise funding set-aside); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (admissions set-aside).

[20]Cf. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484-85 (1982) (distinguishing Hunter v. Erickson, 393 U.S. 385 (1969) from Davis and Feeney).

[21]In fact, the only time Shaw cites Washington v. Davis is for the proposition that purposeful discrimination is relevant to Fourteenth Amendment claims. 113 S. Ct. at 2824.

Court's Fourteenth Amendment jurisprudence: The effects prong in cases involving facially neutral measures would simply disappear. For example, it would no longer be true that vote-dilution claims require "a discriminatory purpose *and* . . . *the effect* of diluting minority voting strength," Shaw, 113 S. Ct. at 2823 (emphasis added). Social harms would independently satisfy Article III, making actual vote-dilution an extraneous element of the claim.

Therefore, an essential part of the distinction between Davis-type facially neutral measures and Shaw-type racial classifications is the injury each requires: challenges to standard facially neutral measures require some individual or group harm; challenges to racial classifications that cause social harms do not. In the voting rights context, vote-dilution and vote-deprivation are group

and individual injuries previously found cognizable by this Court. See Shaw, 113 S. Ct. at 2823 (collecting cases). There fore, when such injuries are at issue, Article III is satisfied.[22] In contrast, plaintiffs in racial gerrymandering cases can identify no such individual or group injury-in-fact unrelated to the government's use of race; their cognizable harm must stem immediately and directly from the existence of a government-enacted racial classification. "*Classifying citizens by race* . . . threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis." Shaw, 113 S. Ct. at 2828 (emphasis

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[22]To invoke the protections of the Fourteenth Amendment, the plaintiffs must also satisfy the "substantial or motivating factor" formulation discussed in Part I, supra. The district court court's use of that test would therefore have been appropriate if the harm at issue were vote-dilution or vote-deprivation: A prima facie Fourteenth Amendment violation would be established by that test, and Article III's injury-in-fact requirement would be satisfied by the dilution or deprivation of the right to vote.

added); see also id. ("[R]eapportionment legislation that *cannot be understood as anything other than an effort to classify* and separate voters by race injures voters in other ways." (emphasis added)); id. at 2832 ("*Racial classifications* with respect to voting carry particular dangers." (emphasis added)).

D. Shaw Recognizes That Some "Rare" Cases Will Involve Facially Neutral Measures That Are "obvious pretext[s] for racial classification"

While Shaw does distinguish racial classifications from Davis-type facially neutral measures, it does not hold that only challenges to *explicit* classifications may rest on social harms. "These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" Shaw, 113 S. Ct. at 2825 (quoting

Arlington Heights, 429 U.S. at 256). According to Shaw, such measures are "'obvious pretext[s] for racial classification.'" Id. (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

As the above discussion establishes, these "rare" statutes do not merely involve substantial racial motivation; social harms arise only from racial classification.[23] Given that reapportionments are facially neutral, the issue thus be-

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[23]The district court attempted to equate Shaw's "unexplainable on grounds other than race" standard with the "substantial factor" test because both appear in the Arlington Heights opinion. 864 F. Supp. at 1372. Arlington Heights, however, never equates the two. The two types of inquiries are separate and distinct.

> Feeney explicitly makes this very point:
> When a statute gender-neutral on its face is challenged on the ground that its effect upon women are disproportionately adverse, a two-fold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, *covert or overt*, is not based upon gender the second question is whether the adverse effect reflects invidious gender-based discrimination.

442 U.S. at 274 (emphasis added; citing Arlington Heights).

comes what characteristic distinguishes a Davis-type claim (which requires individual or group harm) from an "obvious pretext for racial classification" (which does not).

1. The district court overemphasized the importance of shape as an independent factor

Shape was the only nonracial factor invoked by the district court in assessing whether District Eleven was a racial gerrymander. The court thus apparently viewed shape as the characteristic that distinguishes obvious pretexts from other facially neutral measures, noting "that a bizarre district shape is indeed a 'threshold' for purposes of standing." 864 F. Supp. at 1374 n.24. It took this view after interpreting Shaw as creating a right "to challenge a strangely shaped voting district as an impermissible racial gerrymander." Id. at 1359.

While Shaw certainly makes shape relevant to the racial gerrymandering inquiry, the district court's approach overestimates its value. Shape cannot be an independent determinant of Article III injury in fact because this Court has never held that untoward district shape causes any cognizable injury. For example, if shape alone were sufficient, Davis v. Bandemer would not require that plaintiffs in *political* gerrymandering cases always establish that they have been systematically excluded from the political process, 478 U.S. 109, 127 (1986).

In addition, a focus on shape is underinclusive, not encompassing voting schemes clearly contemplated by Shaw. This is the lesson of Gomillion v. Lightfoot, 364 U.S. 339 (1960), invoked by Shaw as a racial gerrymander, 113 S. Ct. at 2823, 2825-26. Professors Pildes and Niemi have calculated that, according to

various statistical measures, 239 current congressional districts are more gerrymandered than the boundaries of Tuskegee at issue in Gomillion. Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno," 92 Mich. L. Rev. 483, 552 & n.192, 564 n.229 (1993). Unless the district court's test includes essentially all configurations other than circles and squares, it therefore cannot account for the Gomillion example.

Finally, the district court's approach is fundamentally flawed because it elevates district shape to constitutional stature: Only plaintiffs challenging those districts with "bizarre" cartography would satisfy Article III's standing requirement. This suggestion is directly contrary to Shaw's "emphasi[s] that these criteria are important not because they

are constitutionally required--they are not," 113 S. Ct. at 2827, and odd in light of the district court's own recognition that "[w]hat the Supreme Court did *not* do is imbue geography with constitutional significance," 864 F. Supp. at 1374 (emphasis added).[24]

2. Shaw's emphasis on "appearance" equates with the need for district lines to mirror racial lines

The opinion below thus essentially bifurcated the "racial gerrymandering" inquiry into an examination of race, see Part I, supra, and a separate examination of gerrymandering, or shape. Shaw, on the other hand, emphasizes not shape but "appearance." While shape is a factor, the focus is properly on the public's likely perception of factors controlling the district's construction. Thus, Justice

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[24]This "approach would [thus] make district shape a (previously unheard of) threshold to constitutional claims." Id.

O'Connor's opinion was concerned that "obvious[]" racial gerrymandering "signal[s]" and "sends" a "message," id. at 2827-28, that "immediately offends principles of racial equality," id. at 2829, the "perception" of which reinforces "stereotype[s]," id. at 2827.[25]

As was explained above, this focus on appearance is rooted in Article III. A predicate to social harms is the social perception of a racial classification. In the racial gerrymandering context, social harms thus require that the district's boundaries appear to have been completely dominated by racial considerations.[26]

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[25]See also id. at 2824 ("resembles"); id. at 2827 ("resemblance")

[26]The required race-based nature of this perception stems from the different nature of the injury recognized in Shaw as compared to injuries found in other decisions. Those harms differ not just in form (i.e., social versus individual or group), but also in stimulus. Individual and group harms bear no intrinsic relationship to the fact that the government's action was race-based: the plaintiffs in Davis were unable to become police officers; the contractor in Croson could not compete equally with minority firms. There is no

Accordingly, the crucial factor is not merely shape, but the obvious correlation between district lines and racial lines. This is the only approach that takes Gomillion into account. In that case, the challenged measure "fenced out" ninety-nine percent of the city's black voters, but no white voters. 364 U.S. at 140-41. Thus, while the boundaries involved were not overwhelmingly extreme,[27] the only conceivable explanation for them was racial discrimination.[28]

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direct tie between those injuries and the government's use of race: each would have been just as actionable if caused by the creation of an illegitimate speech classification or some other non-race-based classification. Social harms, in contrast, are *directly tied* to the existence of the racial classification itself.

[27]This is not to say that shape is irrelevant. Without fairly remarkable cartography, it will never be "obvious" that the district mirrors racial lines: some other motivation, particularly maintaining compact districts, will be perceived as equally or more plausible.

[28]Goldstein Note, supra, at 1185-90, sets out a "totality of the circumstances" approach to incorporating both shape and racial correlation into the racial gerrymandering inquiry.

3. The district court's test for appearances was not sufficiently demanding

A major problem in evaluating the district court's approach to determining whether District Eleven is a racial classification is that it is unclear what standard was applied. At times, the district court at least paid lip service to Shaw's repeated emphasis on the stringent nature of the inquiry. For example, it referred to Shaw's requirement that the district be inexplicable on nonracial grounds, 864 F. Supp. at 1369, which it equated with "a voting district [in which] racial concerns are the only ones plausibly to be inferred from the district's lines," id. at 1373.

In application, however, the district court's approach was dramatically less demanding. In its view, the State of Georgia could only "alter the occasional line," id., and make race "a factor . . .

meaning one factor given no more prominence than various others," id. (emphasis in original).

This last formulation is particularly troubling. A standard that permits race to be only one factor among equals will often mistakenly find racial gerrymandering through what could be termed a "plurality effect." Consider, for example, a hypothetical redistricting statute that is bizarrely shaped and motivated 40% by race, 20% by incumbency, 20% by partisan politics, and 20% by compactness.[29] The district court would erroneously hold it to be a racial gerrymander because race is not "one factor among *many of equal or greater significance* to the drafters."

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[29]This is, of course, a dramatic oversimplification of the wide range of factors that influence the redistricting process. That fact, however, only supports *amicus'* argument. The more factors involved, the less likely it is that any single one will be substantial enough to be of "equal or greater significance" to race, which the Voting Rights Act mandates as a first-order consideration.

Id. at 1372. This would be the approach despite the fact that race in this example constituted not even one-half of the motivation for the district's design.

What the district court thus failed to realize is that Shaw, like this Court's Fourteenth Amendment doctrine generally, evaluates race not against each nonracial factor *alone*, but *against the sum of all nonracial motivations*. Social harms arise, after all, only from a *racial* classification.

Shaw not only measures race against the totality of nonracial factors, it also explicitly requires substantially more racial motivation as a predicate to finding a racial gerrymander than the district court did. Shaw repeatedly emphasizes the extraordinary proof required to find a racial classification, using ten different

phrases to make the point.[30] Thus, race must appear to be the *only* motivation for the district.[31] In particular, Shaw's

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[30]See id. at 2824 ("rationally can be viewed only"); id. at 2825 ("unexplainable on grounds other"); id. ("could not be explained on grounds other"); id. at 2826 ("could be explained only"); id. ("permit of no other conclusion"); id. at 2827 ("obviously . . . created solely"); id. at 2828 ("rationally cannot be understood as anything other"); id. at 2829 ("immediately offends"); id. ("rationally could be understood only"); id. at 2830 ("cannot be understood as anything other"); id. at 2832 ("can be understood only").

The Court in Shaw even went so far as to invoke the value-laden term "rationally," implying that some form of deferential rationality review applies. See id. at 2824 ("rationally can be viewed only"); id. at 2826, 2828, 2830 ("rationally cannot be understood as anything other"); id. at 2829 ("rationally could be understood only"). This is a far cry from the district court's "substantial or motivating" factor inquiry.

[31]See, e.g., id. at 2824 ("rationally can be viewed only as an effort to segregate"); id. at 2826 ("district lines [that] could 'be explained only in racial terms'" (quoting Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (Harlan, J., dissenting))); id. at 2829 ("rationally could be understood only as an effort to segregate"); id. at 2832 ("reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate").

Some have downplayed Shaw's invocation of the word "only" on the ground that all districts, even those that are racial gerrymanders, must comply with the one-person one-vote requirement of Reynolds v. Sims, 377 U.S. 533 (1964). This is mistaken, however, because while the social harms outlined in Shaw are concerned with influences in the districting process, they turn more directly on those factors used to distinguish "*between individuals*," Shaw, 113 S. Ct. at 2824 (emphasis added). The one-person one-vote requirement is never used

specific discussion of social harms is clearly limited to those reapportionments which are designed "solely on the basis of race," id. at 2824, and which "expressly distinguish[] among citizens because of their race," id. at 2825.

The district court attempted to shrug off this overwhelmingly strong language on the ground that it "begs the question: How to determine if a district is so founded upon race that it warrants constitutional notice?," 864 F. Supp. at 1369. *Amicus* respectfully disagrees: Shaw speaks for itself. There is no ambiguity in the phrases "sole[]," 113 S. Ct. at 2824, "only," id., and "unexplainable," id. at 2825.

4. The facts found by the district court do not support

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to distinguish *between* individuals; its only litmus test is whether the individual is alive. Factors such as race, party, and incumbency, on the other hand, are characteristics used by the legislature to distinguish one individual from another.

the conclusion that District Eleven is an obvious pretext for racial classification

That the district court applied a less stringent standard than Shaw requires is clear from its application of the facts before it. The court focused on the appendages lying at the extremes of District Eleven, ignoring the data relating to the vast majority of the district's appearance. Compare 864 F. Supp. at 1375-77 with id. at 1396-97 (Edmondson, J., dissenting). The court did so because it felt that Shaw was satisfied by the conclusion that race was "sometimes the only purpose," id. at 1375 (majority opinion) behind the design of those appendages.

Shaw, however, demands more. Social harms relate to the perception of the district, and thus require not only that race be the only motivation, but that it be the only motivation for the district *on the*

whole.[32] The fact that race was a predominant factor in the inclusion of certain geographic areas does not make the district "unexplainable" on grounds other than race.

This is clear from a review of the "max-black" plan, which *was* solely designed based on race. That plan includes the areas that constitute the appendages in the final design of District Eleven. It also does much more, however, consistently meandering across and through counties, precincts, and towns, with the obvi ous exclusive purpose of capturing black

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[32]The question whether direct evidence of the State's purpose (e.g., legislative history) is relevant can be answered by reference to the functions of Article III and the Fourteenth Amendment in a racial gerrymandering claim. If only the Fourteenth Amendment were involved, Davis teaches that such direct evidence would be relevant. But in Shaw-type cases, the primary question is whether there is an obvious racial classification. The Article III function of social harms makes objective factors central. Once plaintiffs successfully demonstrate the existence of a racial classification through such indirect evidence, there is no need to conduct the "substantial or motivating factor" inquiry; proof of a racial classification more than satisfies the requirements of Davis.

voters. District Eleven, on the other hand, has a much more cohesive central core, designed not according to race, but instead along county lines and other traditional districting criteria. See id. at 1394-97 (Edmondson, J., dissenting).

III. SWEEPING DISSOLUTION OF MINORITY DISTRICTS WILL DISADVANTAGE MINORITY CANDIDATES BY FORCING THEM TO RUN IN MAJORITY-WHITE DISTRICTS AGAINST CANDIDATES WHO ARE ABLE TO RAISE AND SPEND FAR MORE MONEY, A FACTOR WHICH IS KEY TO VICTORY

Unless the Supreme Court corrects the egregious doctrinal errors made by the district court, the nation could face the loss of many--if not most--majority-minority congressional districts. Furthermore, there are already similar challenges to state and local districting plans underway in Louisiana, Ohio, and Texas, suggesting that there could be a wave of invalidations of minority districts at different levels across the country.

These are profoundly troubling devel-

opments. There can be no escaping the reality that "blacks are very unlikely to be elected from any districts that are not majority-minority." Bernard Grofman, et al., Minority Representation and the Quest for Voting Equality 134 (1994). There are presently no African-American Governors in the fifty states and only one African-American United States Senator. Almanac of American Politics (1994). Out of the 435 Representatives in the United States House, there are 40 members of the Congressional Black Caucus, but only 3 represent majority-white constituencies. At the state level, approximately 90% of African-American legislators represent majority-black districts. Chandler Davidson & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation," in Quiet Revolution in the South 335, 337 (Lisa Handley & Bernard Grofman eds., 1994).

Dismantling the bulk of majority-minority districts will reverse the impressive gains minorities have made as elected officials since Congress amended the Voting Rights Act in 1982. This prediction is based not only on the well-documented and well-known racial character of white citizens' voting patterns, but also on the nature of the modern campaign fundraising process, which systematically advantages white and wealthy candidates and disadvantages minorities and champions of the poor. Even if every white voter were to go to the polling place with an open mind and no prejudice, minority candidates will have already been undercut by the fact that white candidates dramatically outraise them in the race for campaign funds.

The current campaign fundraising regime has been described as a "wealth primary" in which candidates, if they are not

personally affluent, must compete to collect large contributions from wealthy donors and political action committees (PACs). See Jamin Raskin & John Bonifaz, "Equal Protection and the Wealth Primary," 11 Yale L. & Pol'y Rev. 273, 287-97 (1993) (describing the political dominance of big money interests in deciding who can run for federal office). At the congressional level, this cash competition has driven the costs of running for office to exorbitant heights.

In 1992, a seat in the U.S. Senate cost, on average, $3.9 million to win, while victory in the U.S. House of Representatives cost, on average, $543,000. Id. at 288. These averages are indeed "artificially small" since so many incumbents have safely defeated opponents over the years--in both money and votes--and can afford to slow down their fundraising efforts. Id. In 1992, for example, four

out of every five House incumbents faced either no challenger or a challenger with so little money as not to be deemed a viable candidate. Id. When races feature meaningful competition, it becomes clear how unreachable political candidacy is for the average citizen and how much money must be raised to be a serious contender. For example, in the 1994 U.S. Senate race in California, millionaire Senator Diane Feinstein and her Republican opponent, millionaire Congressman Michael Huffington, spent a combined total of $41.5 million in their neck-and-neck race. "Wilson Victory at Ballot Box Matched Fund-Raising Efforts," San Fran. Examiner, Feb. 4, 1995.

The high costs of campaigning reflect the fact that those "candidates who spend the most money are consistently the most likely to win." Jamin Raskin & John Bonifaz, "The Constitutional Imperative

and Practical Superiority of Democratically Financed Elections," 94 Colum. L. Rev. 1160, 1175 (1994). In 388 of 435 House races in 1992, the candidate who spent the most won. Id. In the thirty-six Senate races that year, thirty-one of the winners outspent their opponents. Id.

Because of the harsh rules of the wealth primary, serious candidates "must have either great personal wealth or a political program compatible with the interests of those who do." Id. For it is no longer "possible to run a House or Senate campaign on the force of small contributions." Id. Rather, campaigns are won and lost by virtue of large contributions from affluent citizens and PACs. "Less than one percent of the nation's population contributed seventy-seven percent of all campaign funds raised in the 1992 election cycle in individual contributions of $200 or more." Id. According to the

1992 Citizen Participation Project survey directed by Dr. Sidney Verba of Harvard University, the "richest" citizens making more than $75,000 a year are "100 times more likely" than poor citizens "to contribute to a political candidate." Id. (citation and quotation marks omitted). Furthermore, this study found that among those giving campaign money, "there is a substantial difference in the *amount* given. The rich give a great deal more." The Citizen Participation Project, 1992 Survey: Summary of Findings 5 (1992).

Because the wealth primary is skewed to favor independently wealthy candidates and those who can collect large numbers of big contributions from wealthy individuals and PACs, it creates a terribly hostile environment for minority candidates. The "distribution of wealth in the United States is more unequal than in any other industrialized nation," Stephen Loffredo,

"Poverty, Democracy and Constitutional Law," 141 U. Pa. L. Rev. 1277, 1386 (1993), and racial minorities have much less wealth and income than whites. See, e.g., Richard A. Epstein, "Caste and the Civil Rights Laws," 92 Mich. L. Rev. 2456, 2463 (1994) (pointing out that white America ranks first among nations on earth in terms of life expectancy at birth, education, and income, while African-Americans rank thirty-second behind Trinidad and Tobago, and Hispanics rank thirty-fifth behind Estonia); Press Release, "Median Net Worth of Nation's Households Dropped 12 Percent Between 1988 and 1991" (Jan. 26, 1994) (stating that white households had a median net worth of $44,408, while African-American households had a median net worth of $4,604, and Hispanic households had a median net worth of $5,345). This deep racial disparity in wealth and income means that the vast majority of

African-Americans have less money with which to finance their own political campaigns or make political campaign contributions to others.

Through existing majority-minority districts, the tremendous financial disabilities suffered by minority candidates have been mitigated by the fact that such candidates have competed principally against one another. If minority districts are lost, minority candidates will be thrust into electoral arenas where white rivals will begin with greater personal wealth and then go on to collect much more money in districts already predisposed to dismiss minority candidates.

These conclusions are not idle speculation. The Chicago Urban League recently performed an exhaustive study of the relationship between race and campaign contributions in the 1991 Chicago City Council elections. The study produced stunning

findings. In these elections, money was a critical factor because the strongest predictors of candidate vote totals were "incumbency and the level of campaign expenditures." James Lewis, et al., Equality of Opportunity? Financing 1991 Campaigns for the Chicago City Council i (1995). Meanwhile, the race of the candidate was "the most important determinant of how much money a candidate will be able to raise." Id. at 8. On average, the study found that "whites raised approximately 5 times as much for city council races as did African-Americans and approximately 1.5 times more than did Latinos." Id. at i. The average white candidate raised $42,068 more than the average African-American candidate for City Council and $32,617 more than the average Hispanic candidate. Id. at 8.

The Urban League found that the "huge difference between contribution totals for

African-Americans and whites" was "primarily attributable to the total number of contributions given rather than to their size." Id. at i. That is, those people in minority communities who could afford to give substantial contributions to their favored candidates did so, but far fewer could in fact afford to do so than residents of white neighborhoods. "Higher income communities generate significantly more individual campaign contributions than lower income communities." Id. Because "income and race are so closely correlated" in Chicago (as in the rest of the country), the study concluded that the relative scarcity of funds in minority neighborhoods presented "a serious problem" for "minority candidates running in wards that have significant white middle- or upper-class neighborhoods that produce white candidates." Id.

Indeed, the study found that every

time a white candidate faced minority candidates--even in predominantly minority communities--the white candidate was able to raise more funds. Meanwhile, no African-American or Hispanic alderman "has ever been elected from a majority white ward." Id. at 7.

The Chicago study offers a sobering glimpse of the fate of minority candidates forced into majority-white districts. Of course, we could speak with even more confidence if we had a study of patterns of fundraising and electoral success by minority candidates running in majority-white congressional districts, but so few ever attempt the feat that such a study would have principally anecdotal value. In fact, according to data provided to *amicus* by the Center for Responsive Politics, results of the rare cases in which minorities attempt to take on white candidates at the state level reinforce the

conclusions of the Chicago study. Only two minorities faced white candidates for U.S. Senate seats in 1994 and both lost--first in the wealth primary and then at the ballot box. In the state of Washington, Republican Slade Gorton raised $4.8 million to defeat his African-American opponent, Democrat Ron Sims, who managed to raise only $1.2 million. Meanwhile, in Missouri, Republican John Ashcroft spent $4.2 million to defeat his African-American opponent, Congressman Alan Wheat, who--even as a sitting member of the U.S. House of Representatives--was able to collect only $3.4 million, an eight-hundred thousand dollar difference.

By driving minority elected officials into majority-white jurisdictions and reducing their numbers in office, a juridical assault on minority districts will damage the effective political representation of minorities and the non-affluent.

In the past, the Supreme Court has refused to countenance electoral practices that dilute the political opportunities of the poor. See Bullock v. Carter, 405 U.S. 134, 143-44 (1972) (striking down exorbitant candidate filing fees in Texas primary elections; stating that the fees gave the political system a "patently exclusionary character" by excluding "potential office seekers lacking both personal wealth and affluent backers" and thus reducing the electoral choices of the "less affluent segment of the community"); Harper v. State Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down a $1.50 poll tax in Virginia elections on ground that voter qualifications "have no relation to wealth"). The Court should not uphold flawed lower court decisions that threaten to erode the recent electoral successes of minority candidates and further reduce the political power of the

poor.

It is possible that Congresswoman Cynthia McKinney, if forced into a majority-white district, could overcome the traditional fundraising advantages that white candidates have, as well as the historic resistance of whites to voting for African-Americans, in order to defeat her opponents. But honesty compels us to admit that it is not at all likely. The future is better foretold by Congressman Cleo Fields, whose Louisiana district has been dismembered by another "racial gerrymandering" decision, Hays v. Louisiana. After having his district struck down, Congressman Fields has chosen to bypass the next campaign in a majority-white district. It is hard to second-guess his decision since no minority has ever been sent to Congress by a majority-white district in Louisiana. In sum, when we consider the racial consequences of the

wealth primary with traditional patterns of racially polarized voting, the reduction of majority-minority districts will almost certainly mean reduction of minority representation in Congress.

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the judgment of the district court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

ZELL MILLER, *et al.*,
Appellants,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND
BRIEF OF A. J. PATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

A. J. Pate hereby respectfully moves for leave to file the attached brief *amicus curiae* in these cases in support of appellees, as provided in Rule 37 of the Rules of this Court. The consent of the counsels of record for all appellants has been obtained. Consent of counsel for the appellees has been requested but not obtained.

A. J. Pate is a private citizen, who, on his own time and at his own expense, became deeply involved in a quest for fair congressional redistricting for the State of Texas for the 1990's. However, the Texas Legislature produced the most extremely gerrymandered plan in the history of the United States. This brief is a continuation and expansion of that quest, seeking to restore the concept of representation to its original and nobler intent, principally through the use of traditional districting standards.

Appellees will appropriately concentrate on the specific facts of their own case. However, in the brief attached to this motion, A. J. Pate treats the issue in its broader aspects and ultimate impact, including significant considerations which he believes the Court should take into account. It is his hope that this contribution will assist the Court in setting the issues presented by these cases in a broader context for a comprehensive review of the grave import and consequences that the Court's decision may have on our republican form of government.

For these reasons, A. J. Pate respectfully requests the Court to grant this motion for leave to file his attached brief, with the highest of motives, as a true friend of the Court.

Respectfully submitted,

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March 20, 1995

BRIEF OF A. J. PATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. GERRYMANDERING IS A CORRUPTION OF THE REDISTRICTING PROCESS WHICH PUTS THE SELF-INTERESTS OF POLITICIANS ABOVE THE INTERESTS OF THE PEOPLE, AFFECTING THE INTEGRITY OF THE POLITICAL SYSTEM WITH THE POTENTIAL OF TAINTING THE LEGITIMACY OF ALL THREE BRANCHES OF GOVERNMENT.	2
II. GERRYMANDERING IS DRIVEN BY PARTISAN POLITICS AND ENTRENCHED INCUMBENCY, NEITHER EXISTING WHEN THE CONSTITUTION WAS WRITTEN; THE ORIGINAL CONCEPT OF REPRESENTATION WAS BASED ON THE COUNTY AND THE COMMUNITY.	6
III. GERRYMANDERING VIOLATES THE REPUBLICAN CONCEPT OF REPRESENTATION BY FRAGMENTING COMMUNITIES OF INTEREST, WHICH ARE DISCRETE AND INSULAR GROUPINGS OF PERSONS WITHIN GEOGRAPHICALLY-DEFINABLE AREAS BASED ON RACE, ETHNICITY, INDUSTRY, ETC.	8

Page

IV. GERRYMANDERING SHOULD BE DECLARED UNCONSTITUTIONAL *PER SE* BECAUSE IT DENIES FAIR AND EFFECTIVE REPRESENTATION TO COMMUNITIES OF INTEREST, A PROCESS WHICH THE POLITICAL SYSTEM IN EFFECT IS INSTITUTIONALLY INCAPABLE OF CHANGING INTERNALLY AND WHICH IS VIRTUALLY IMPERVIOUS TO EXTERNAL CHANGE, THUS REQUIRING JUDICIAL REMEDY. 12

V. THE CONSTITUTION IS VIOLATED BY GERRYMANDERING, WHICH SHOULD BE REDRESSED BY THE CONSISTENT, LOGICAL, AND NEUTRAL PRINCIPLE THAT ALL GERRYMANDERINGS ARE UNCONSTITUTIONAL *PER SE*. 14

A. The Due Process Clause of the Fourteenth Amendment is violated because gerrymandering results from an unfair and illegitimate process of state government, in a breach of strict governmental neutrality. 15

B. The Equal Protection Clause of the Fourteenth Amendment is violated because gerrymandering dilutes and debases the votes of discrete, insular, and identifiable communities of interest, denying them equality of representation. 16

Page

C. The Guarantee Clause of Article IV, Section 4, is violated because gerrymandering denies or dilutes the rights and political power of the people derived from our republican form of government. 18

D. The First Amendment is violated because gerrymandering discriminates against communities of interest by abridging their freedoms of political speech and assembly (association) through fragmentation. 22

E. Article I, Section 2, is violated because gerrymandering in effect selects the members of Congress and state legislatures, depriving the people of the political power and right to fairly and effectively constitute their own legislatures and congressional delegations. 24

VI. IF GERRYMANDERING IS DECLARED UNCONSTITUTIONAL *PER SE*, THERE WOULD BE A *PRIMA FACIE* PRESUMPTION OF CONSTITUTIONALITY IF THE STATE LEGISLATURES FOLLOW JUDICIALLY MANAGEABLE STANDARDS SUGGESTED BY THE COURT. 24

VII. CONCLUSION 29

Page

APPENDIX A: PROPOSED MODEL STANDARDS FOR REDISTRICTING A.i

APPENDIX B: COLLATERAL ISSUES AND RELATED DECISIONS B.i

a. Population Equality of Districts
b. Partisan Gerrymandering / Proportional Representation
c. Creation of Majority and Influence Districts for Racial/Ethnic Minorities
d. Retrogression of Racial/Ethnic Minority Districts
e. Other Issues - Incumbency and Competitive Districts

TABLE OF AUTHORITIES

Cases

Page

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Badham v. Eu, 488 U.S. 1024 (1988) 26

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Beer v. U.S., 425 U.S. 130 (1976) . . . . . B.x, B.xi

Colegrove v. Green, 328 U.S. 549 (1946) 4, 10, 20, 24

Cousins v. City Council of City of Chicago, 466 F. 2d 830 (1972) 15

Davis v. Bandemer, 478 U.S. 109 (1986) . . 2, 4, 9-12, 15-17, 22, 27, B.iii-B.vi

Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459 (M.D. Ala. 1988) . . . . . B.ix

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 15

Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) 20

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Kirkpatrick v. Priesler, 394 U.S. 542 (1969) . . . . . 4, B.i, B.ii

Page

Kohler v. Tugwell, 292 F. Supp. 978 (1968) 20, 21

Legislature of State of Cal. v. Reinecke, 110 Cal. Rptr. 718 (1973) 27

Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 9, 11

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Mobile v. Borden, 446 U.S. 55 (1980) 17

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Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) . . . 1

Wesberry v. Sanders, 376 U.S. 1 (1964) 24

Williams v. Rhodes, 393 U.S. 23 (1968) 23

Wilson v. Eu, 4 Cal. Rptr. 2d 379 (Cal. 1992) 27

Provisions of the U. S. Constitution

Page

Article I, Section 2 . . . . . 2, 24

Article I, Section 4 25

Article IV, Section 4 . . . . . 2, 18-22

Amendment I 2, 22, 23

Amendment XIV 2, 15-18, 20, 23

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Other

Page

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Page

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INTEREST OF THE *AMICUS CURIAE*

Because of the interest of the *amicus curiae* in the preservation of our republican form of government, the *amicus curiae* became very involved in the 1990 cycle of the congressional redistricting process in the State of Texas, testifying before various legislative committees and co-authoring a redistricting plan for the State. This plan received considerable attention during the hearing of *Vera v. Richards*, 861 F. Supp. 1304 (see pp. 1330 and 1342), a case similar to these cases, also involving racial gerrymandering.

This brief makes points, advances legal theories, and cites authorities which are highly relevant, but unlikely to be discussed or mentioned by the parties in these cases.

SUMMARY OF ARGUMENT

After surveying thirty years of redistricting decisions by the Court, all essentially gerrymandering cases, the goal of "fair and effective representation" appears as elusive as ever. Now, the Court once more must decide on the latest variation on the gerrymandering theme.

While the Court in this instant case appropriately should rule in favor of the appellees, that racial gerrymandering is unconstitutional, a narrow ruling limited to this specific issue would only open up another whole new area for seemingly endless litigation, contentious and divisive. What demagogic schemes and misguided legislation, corrosive to our republican form of government, would be contrived in reaction to such ruling? What bizarre and limitless mutations of the gerrymander, now unforeseen, would present the Court with future perplexities?

However, the Court has another choice - to cut the Gordian knot restraining fair and effective representation by declaring gerrymandering unconstitutional *per se*. This clear-cut ruling would be augmented by the Court's suggestion of judicially manageable standards, which, if followed, would establish a

prima facie presumption of constitutionality.

This brief strongly urges the Court to adopt the consistent, logical, and neutral principle offered by the latter choice. Such a decision would be a natural culmination for the Court since thirty years of judicial restraint have only resulted in ever more extreme gerrymanderings. This would not be a new concept for the Court. Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 745-765, and Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, make explicit and very persuasive arguments for the unconstitutionality of gerrymandering *per se,* contending that all forms should be judged by the same constitutional standards.

There is ample remedy in the Constitution to ban the gerrymander. Beside the Equal Protection Clause of the Fourteenth Amendment offered by Justices Stevens and Powell, gerrymandering also violates the Due Process Clause through the unfairness of a governmental process and related conflicts of interest; the Guarantee Clause, Article IV, Section 4, by abridging the political power of the people assured by our republican form of government; the First Amendment by abridging freedoms of political speech and association; and Article I, Section 2, by depriving the people of the right to choose fair and effective representation for their common interests.

This decision would restore original intent to the redistricting process by providing fair and effective representation for the people, equally for all groups in their communities of interest. Judicially manageable standards could also provide a principled resolution to most collateral issues relating to districting and the electoral system (see Appendix B *infra*).

ARGUMENT

I.

Reapportionment of congressional seats is fundamentally a division of political power between the states. In turn, re-

districting is a division of political power within the states. Since redistricting is a zero-sum process, to the extent that redistricting is not conducted fairly, some groups or persons must necessarily gain at the expense of others whose voting power has thus been diluted.

Reapportionment is an objective process in the U. S. Congress based on an established formula. By stark contrast, the redistricting process for both state and federal districts, done by the state legislatures in most states, is extremely subjective with virtually no constraints on how the district lines are drawn. In the legislatures, redistricting is a highly partisan process, a spoils system with little or no regard for democratic ideals and consideration of the interests of the people. This corruption of the political system is achieved through gerrymandering, which has been defined by *Black's Law Dictionary,* Sixth Edition (West Publishing Co., 1990), p. 687, as: "A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines."

The sole purpose of gerrymandering is to give more weight to certain votes than to others in order to assure predetermined results for at least a decade. Gerrymandering is the most undemocratic and unrepublican (and thus unconstitutional) of deeds in our political system, yet incredibly is presented to the people as law, official acts of state government!

Despite the many "apportionment" cases over recent decades, gerrymanderings have only grown apace. In fact, the extreme application of the "one person, one vote" rule has

only provided a convenient cover for gerrymandering.[1] It is instructive to compare the illustrations of gerrymandering provided by Justice Frankfurter in *Coleman v. Green*, 328 U. S. at 560-563 ("fair samples of prevailing gerrymanders" in 1946), to California's redistricting in the 1980 cycle and Texas' redistricting in the 1990 cycle.

Gerrymandering often results in reduced political competition through one-party dominance in elections which are little more than *pro forma* exercises, leading inexorably to declining voter interest and participation, increasing public cynicism, and an alienation of the represented from the representative. Gerrymandering, in a gross mockery of the system, turns the concept of representation on its head; representatives select the people they wish to represent, rather than the people choosing whom they wish to represent them.

Gerrymandering has been called the moral (and functional) equivalent of stuffing the ballot box. The bizarre shapes of districts fragment existing state and local political units and communities of interest at will, disconnecting the people from the process and their representatives. The multi-layered cycles of gerrymandering are self-perpetuating without practical hope of legislative redress.

Gerrymandering trivializes elections by predetermining results for up to ten years before any votes are even cast. It does not allow a coherent and mutable expression of the will of the people, which obviously thwarts the purpose of democracy and representative government.

Our republican form of government is a social contract between the people, who have the ultimate and permanent power, and their representatives, whom the people entrust as temporary custodians of their diverse interests. This contract presupposes that these elected representatives will always

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[1]See Chief Justice Warren's prescient warning in *Reynolds v. Sims*, 377 U. S. at 578-579. Similar concerns have also been expressed by Justice White, *Kirkpatrick v. Preisler*, 394 U. S. at 555; Justice Harlan, *op. cit.* at 551; and Justice Powell, *Davis v. Bandemer*, 478 U.S. at 170-173.

perform their fiduciary responsibilities honorably and in good faith on behalf of the people to serve their best interests.

The interests of the people are never more at risk than when these same representatives, in an intrinsic and direct conflict of interests, must redraw the boundaries of their own districts. This same conflict of interests, though sometimes indirect, applies to congressional districts as well. In these conflicts, the interests of the people always lose. Gerrymandering, in a betrayal of public trust, puts the illegitimate self-interests of the few controlling the process above the legitimate interests of the many, the people. To add insult to injury, the politicians in control of state government use public funds to pay the costs of subverting the redistricting process to their own self-interests, and subsequently use more public funds if necessary to defend their chicanery against its immediate victims. In any other context, such actions would be criminal - using a position of public (or even private) trust and its funds for self-aggrandizement, in terms of wealth or power, or both.

Gerrymandered districts are sometimes excused by the judiciary as justified by "legitimate state interests" or "rational state policies". What legitimate state interests can there be in gerrymandering? The "state" must not be confused with the politicians who may be in control of the state government at a particular time; rather, the state is the embodiment of the people. The only legitimate state interest in redistricting is to provide fair and effective representation for the people and their interests.

When the right to vote is tampered with, it is not only a threat to the legitimacy of the legislative bodies, but to the legislation enacted as well. Such questions of legitimacy could even extend to the Presidency in the event of a President being chosen by a House of Representatives so constituted (and to subsequent judicial appointments), when no majority was obtained in the Electoral College. Thus, gerrymandering could potentially taint the legitimacy of all three branches of the federal government!

II.

The principal engines driving gerrymandering are the powerful interrelated forces of partisan politics and entrenched incumbency, neither more than an ill portent when the Constitution was written.

Law has been described as "the principles of the text, whether Constitution or statute, as generally understood at the enactment".[2] In this light, the nature of the political system and of representation, contemporaneous with the writing of the Constitution, should be briefly examined, providing insight into the conceptual matrix of the men who inspired, framed, approved, and implemented the Constitution.

At the writing of the Constitution, the potential development of political parties was a matter of great concern and a subject of dire warnings. The words "faction" and "party" seem to have been used rather interchangeably in these warnings and apparently referred to some modern combination of political parties and special interest groups.[3] In the course of time, political parties did develop, and special interest groups are now a ubiquitous part of the political scene. The fears and warnings of Madison and Washington have been fully realized, at least to the extent of the anti-republican practice of gerrymandering.

Entrenched incumbency was also considered undesirable, with term limitations often imposed, as evidenced by the Virginia Declaration of Rights (*ibid.*, pp. 311-313), adopted unanimously on June 12, 1776; this document lent wording to the Declaration of Independence and much substance to the Bill of Rights, incorporated as the first ten amendments of the Constitution. Also, see the Articles of Confederation, Article

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[2]Robert H. Bork, *The Tempting of America* (The Free Press, 1990), p. 5.

[3]See Madison, *The Federalist* No. 10, pp. 54-59, and George Washington's Farewell Address, *The Guide to American Law*, Vol. 11 (West Publishing Co., 1985), pp. 375-376.

V, and the Pennsylvania Constitution of 1776 (*ibid.*, pp. 337-344 and 320-331).

In practice, these sentiments were widely held and regarded. "Throughout the entire first century of [Congress'] history, members entered and left Congress with a frequency that stands in sharp contrast with modern standards. During this period, the median term of service in the House of Representatives fluctuated between two and four years, and the proportion of members who served more than four terms never exceeded ten percent."[4]

The basic political unit of representation for the colonies and succeeding states was the county. Additionally, in the colonial and state lower chambers, representation sometimes would be provided variously to sub-units of the county, *i.e.*, towns, cities, parishes, and "places". In the upper chambers, counties were used almost exclusively, either singly or in districts composed of multiple counties. Comparing the state constitutions before the Federal Constitution (most dated from 1776 to 1778) to those next following after adoption of the Constitution in 1788 shows virtually no change in the basic units for representation.[5]

The Ordinance of 1787,[6] commonly called the Northwest Ordinance, enacted by the Continental Congress on July 13, 1787, during the Constitutional Convention, provided for a general assembly; the inhabitants were authorized "to elect representatives from their counties or townships to represent them in the general assembly" (*ibid.*, p. 347).

The Missouri Compromise (*ibid.*, p. 388), by which

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[4]Jack N. Rakove, "The Structure of Politics at the Accession of George Washington", *Beyond Confederation: Origins of the Constitution and American National Identity*, Richard Beeman *et al.* (University of North Carolina Press, 1987), p. 272.

[5]See *The Federal and State Constitutions, Colonial Charters, and Other Laws of the United States*, Ben. Perley Poore, ed. (Government Printing Office, 1878).

[6]*Guide to American Law*, *op. cit.*, pp. 345-350.

Congress admitted Missouri into the Union in March 1821, provided in Section 3 that voters were to "choose representatives to form a convention, who shall be apportioned amongst the several counties", which were then listed with the number of representatives designated for each county. The purpose of the convention was to form a state constitution and government.

The latter two documents are particularly noteworthy because both were enacted by Congress, one under the Articles of Confederation and one under the Constitution, and both prescribed systems of representation for territories based on counties. These were obviously Congress' practical applications (if not models) of its concept of republican government, since both documents also specifically required that the state constitutions and governments to be formed "shall be republican".[7]

Even today, after more than two centuries, the county is still the principal sub-unit of government within the states, and logically there is no reason it should not regain its historic role in the districting process. And not simply because it would be a restoration of original intent, but because, now as then, it is also the wisest way to help ensure fair and effective representation for the people in their communities of interest.

III.

Mason, in Article VI of the Virginia Declaration of Rights, stated that electors and their representatives should have "sufficient evidence of permanent common interest with, and attachment to, the community".[8] In *The Federalist* No. 10, p. 55, Madison wrote in similar words concerning factions

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[7] *Ibid.*, pp. 349 and 389. Also, see Madison, *The Federalist* No. 39, pp. 254-255, and *The Papers of James Madison*, Vol. 8, Robert A. Rutland, ed. (University of Chicago Press, 1973), p. 354.

[8] *Guide to American Law, op. cit.*, p. 312. Also, see Madison, *The Federalist* No. 56, pp. 377 and 380-381, and Hamilton, *The Federalist* No. 71, p. 479.

which are "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community", linking individual rights with community interests.

In a republican form of government, if representation is to have any intrinsic meaning at all, it must be based on organic groupings of socially-cohesive persons with common sets of interests within geographically-definable areas.[9]

The representation of interests in relation to place has been noted by several Justices. Justice Harlan in *Reynolds v. Sims*, 377 U.S. at 623-624, in response to another Justice's comment that "people, not land or trees or pastures, vote", stated: "But it is surely equally obvious, and, in the context of elections, more meaningful[,] to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests - economic, social, political - many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for[,] the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation." Justice Stewart, in *Lucas v. Colorado General Assembly*, 377 U. S. at 750, stated: "[L]egislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts - people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests." Justice Powell in *Davis v. Bandemer*, 478 U.S. at 176 (part III, section B), discusses at length the adverse impact of districting which lacerates communities of interest.

Providing equal political rights for all communities of

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[9]See Edmund S. Morgan, "Government by Fiction: The Idea of Representation", *The Yale Review*, Spring 1983, pp. 326-328 and 336.

interest is a principled approach to representation: How can it be recognized that group or collective rights are in fact important in the political process, yet allow those rights to be claimed only by certain groups while simultaneously denying the same constitutional protection to others? Justice Black, in *Colegrove v. Green*, 328 U. S. at 571, wrote: "For legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingeniously or ingenuously.'" Treating all communities the same under the law puts emphasis on the unifying dynamics within each particular community, as opposed to the emphasis placed on the divisions between communities which is the unfortunate consequence of singling out specific protected groups for favored treatment.

Districting based on communities of interest would result in a more effective political participation (in both broad and partisan aspects), a stable electorate capable of corporate effort, and a sense of rational connection between members of the community, its representatives, and the political system. A study published in May 1986 documented that "Familiarity with congressional candidates is greater the less a community is divided among multiple districts." The study concluded that: "[A] specific contribution [is] made by the preservation of natural communities. ... [T]he effect is real enough ... and large enough that by itself it suggests that preservation of community boundaries merits more attention than the Court has heretofore given it. ... [I]t must now be said that there is some genuine, empirical basis on which to press for greater consideration of natural community boundaries in the redistricting process."[10]

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[10]Richard G. Niemi, Lynda W. Powell, and Patricia L. Bicknell, "The Effect of Community-Congressional Districting Congruity on Knowledge of Congressional Candidates", *Legislative Studies Quarterly*,, May 1986, Vol. XI (University of Iowa), pp. 198-199. Also, see *Karcher v. Daggett*, 462 U.S. at 787 (note 3).

In a resumption of their historical role and significance since colonial days, counties should be the basic political unit for defining communities of interest. In rural areas, a number of affinitive counties may need to be combined to attain appropriate district populations with broad common interests (macro communities of interest), often based on geographic features or agricultural and ranching activities. In urban/suburban areas, counties may need to be subdivided into districts with interests more narrowly focused (micro communities of interest), usually neighborhoods based on race, ethnicity, socio-economic class, or industry.

Voting rights are individual rights, but they can be rendered virtually meaningless if fair and effective representation is not provided for interests collectively held in a community of interest. Indeed, the republican concept of representation by definition considers the electorate not as individuals but as members of groups with common interests participating collectively. In *Lucas v. Colorado General Assembly*, 377 U. S. at 749, Justice Stewart wrote: "Representative government is a process of accomodating group interests through democratic institutional arrangements. ... Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation ... of the various groups and interests making up the electorate." As Justice Powell wrote in *Davis v. Bandemer*, 478 U.S. at 167: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." (And the obvious might be added: voters are represented collectively, not individually.) This recognition of collective representation only enhances rather than diminishes the value of an individual vote.

Individual voting rights are inextricably linked with collective or group voting rights, "the essential rights of the community",[11] whether in terms of equal weighting or equal

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[11]Hamilton, *The Federalist* No. 60, p. 408.

meaningfulness. The perceived tension between these rights is both artificial and illogical. Of what value is a vote of equal weight if its use is meaningless? Individuals gain political power only through collective action in the political process. Group viability is reliant upon shared or common concerns, interests, and values, *i.e.*, communities of interest.

Justice Powell, in *Karcher v. Daggett*, 462 U.S. at 787, stated: "A legislator cannot represent his constituents properly - nor can voters from a fragmented district exercise the ballot intelligently - when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State." And, at 788, concluded: "I do believe ... that the constitutional mandate of 'fair and effective representation' ... proscribes apportionment plans that have the purpose and effect of substantially disenfranchising identifiable groups of voters." [References and footnotes deleted.]

IV.

It is clear that gerrymandering is antithetical to fair and effective representation by the denial of equal representation for the various discrete, insular, and identifiable groups who share common interests within their communities. It is equally clear that gerrymandering should be unconstitutional *per se*.[12] The practice has become so pervasive and imbedded into the political system that it is virtually institutionalized. It is so pernicious to representative government and so corrosive in its effect on the democratic process that it should no longer be tolerated by the judiciary.

There is an irreconcilable conflict of interest between political self-interests and the right of the people to fair and effective representation. The system is institutionally incapable of internal change, and it is virtually impervious to

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[12]Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 745-765, and Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, make compelling cases for the unconstitutionality of gerrymandering *per se*.

external change because it is self-perpetuating. Since career politicians are well-versed in the complex machinations of redistricting and, using the people's own money, control the entire process as well, the people are overwhelmingly disadvantaged.[13] The process, at its best, is arcane and disjointed, extending over a number of years.

The Court's restraint and three decades of related decisions have failed to result in the achievement of fair and effective representation.[14] Rather then ameliorating with time and despite the Court's efforts (indeed, some have said in part due to), gerrymandering has only become less subtle and more efficient, aided exponentially by accelerating computer technologies.[15] This progression can be quickly confirmed by comparison of the congressional districts for California in the 1980 cycle to those for Texas in the current cycle.

Why should a cabal of political aristocrats, state and federal legislators, be allowed to pervert with impunity the redistricting process for their own petty self-interests, demonstrating contempt for democratic ideals, republican principles, judicial restraint, and ultimately the rights of the

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[13]In California, one of the few states where voters can attempt direct action through ballot initiatives and referenda, several such efforts have met relentless opposition by politicians. Then even when one effort was successful, the referendum was effectively overturned by a partisan state Supreme Court which allowed the offending legislature to redraw district lines basically the same as those rejected by the people by a vote exceeding 60%. See T. Anthony Quinn, *Carving Up California: A History of Redistricting, 1951-1984* (Rose Institute of State and Local Government, Claremont McKenna College) [unpublished manuscript], pp. 54-130 of the section "All Passion Spent: California's 1981-1984 Reapportionment".

[14]See 781 F. Supp. at 402 (1991).

[15]*E.g.*, the *Congressional District Atlas* for the 1990 redistricting cycle is contained in two volumes, each larger than the single volume for the 1980 cycle. The 1990 district maps for Texas required 177 pages, compared to only 16 for 1980; North Carolina required 54 pages, compared to only 3 for 1980. U.S. Bureau of the Census, *Congressional District Atlas, 103rd Congress of the United States*, Vol. 2, U. S. Government Printing Office (1993).

people? Should the judiciary respect those interests, if at all, above the legitimate common interests of the people?[16]

Regarding the issue of determining representation for the states, Mason, in the constitutional debates, arguing for "some permanent and precise standard as essential to ... fair representation", said: "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it."[17] Madison, in *The Federalist* No. 51, p. 348, wrote: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." [Emphasis added.]

The Court should now exercise an "auxiliary precaution" by declaring gerrymandering unconstitutional *per se*, thus obliging the state legislatures to control themselves in the redistricting process.

V.

As previously cited, *Black's Law Dictionary* defined gerrymandering as "the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose". Gerrymandering may be further defined functionally as: "Maldistricting by biased and

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[16]See 781 F. Supp. at 409 and Hamilton, *The Federalist* No. 78, p. 522.

[17]*Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press, 1966), p. 266.

self-interested persons using an unfair process to debase the political influence or power, whether by intent or effect, of certain discrete, insular, and identifiable groups of voters in choosing representation for their common interests; most commonly used to describe state legislative actions, as defined above, using public funds to finance the process with its results established by state law."

All the major redistricting decisions of the Court have been essentially gerrymandering cases under either definition noted above. These cases shared the common characteristics of involving gerrymanderings which denied fair and effective representation for communities of interest,[18] accomplished through unfair and discriminatory manipulation of the political process.[19] Since the affront to the Constitution is the same and the cause is the same, then the constitutional redress should be the same. This redress should be based on the consistent, logical, and neutral principle that all gerrymanderings are unconstitutional *per se*.

The following provisions in the Constitution assert to the unconstitutionality of gerrymandering: the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, the Guarantee Clause in Article IV, Section 4, the First Amendment, and Article I, Section 2.

Due Process Clause

Gerrymanderings are the products of an unfair political process which is beyond any reasonable expectation of the

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[18]*Davis v. Bandemer* is an exception. Political parties are not communities of interest; they are neither discrete nor insular nor permanent (nor identifiable except episodically). That this is also the most ineffectual of these cases is perhaps not mere coincidence.

[19]These characterizations are supported by Justice Stevens' (then circuit judge) comments in *Cousins v. City Council of City of Chicago*, 466 F. 2d at 847, specifically regarding the *Baker* and *Gomillion* decisions. At 853, Justice Stevens wrote: "I believe all gerrymandering should be judged by the same constitutional standard."

people to effectively change. This hopelessly irreformable corruption of the redistricting process is a violation of due process, a requirement for procedural fairness. If the process is not legitimate nor fair, then what flows from it is of highly questionable legitimacy or fairness. The Due Process Clause requires the substance of any law to be implemented through fair procedures.

Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 173, wrote that, in testing "redistricting plans against constitutional challenges", "[o]ther relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted ... which bear directly on the fairness of a redistricting plan". He added, at 175: "A court should look first to the legislative process by which the challenged plan was adopted." The text following made it clear that "adopted" included mapmaking.

Equal Protection Clause

Justice Stevens in *Karcher v. Daggett*, 462 U.S. at 745-765, makes a powerful argument for the unconstitutionality of gerrymandering. He bases this opinion on the Equal Protection Clause of the Fourteenth Amendment: "[P]olitical gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." (At 744; also see related note 1.) He further details this assertion in Part I of his opinion (at 745-750). The "guarantee of equality of representation ... is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment." (At 747; also see related note 5.) "The Equal Protection Clause requires every state to govern impartially. When a state adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment - whether racial, ethnic, religious, economic, or political - that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional

guarantee of equal protection." (At 748; references omitted.) "There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well." (At 749; references omitted.)

Justice Stevens in an earlier opinion, *Mobile v. Borden*, 446 U. S. at 86, had stated that gerrymandering violated the Equal Protection Clause which applied "not merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic, and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering - not just to racial gerrymandering." Also, in note 7 at 87, he added: "This view is consistent with the Court's Fourteenth Amendment cases in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard."

Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 161-185, also makes a compelling exposition for the unconstitutionality of gerrymandering. In section B of part II at 166-167, he writes: "The Equal Protection Clause guarantees citizens that their State will govern them impartially. In the context of redistricting, that guarantee is of critical importance because the franchise provides most citizens their only voice in the legislative process. Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. ... The Court's decision in *Reynolds v. Sims* illustrates two concepts that are vitally important in evaluating an equal protection challenge to redistricting. First, the Court recognized that equal protection encompasses

a guarantee of equal *representation*, requiring a State to seek to achieve through redistricting 'fair and effective representation for all citizens.' ... Second, ... the Court plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one." [References omitted.]

Chief Justice Warren, in *Reynolds v. Sims*, 377 U.S. at 565-566, wrote: "[E]very citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. ... Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status ..." [References omitted.]

Guarantee Clause

In *The Federalist* No. 39, Madison discussed the republican government formed by the Constitution and guaranteed to the states: "[T]he general form and aspect of the government [must] be strictly republican. ..." (P. 250.) "[W]e may define a republic to be ... a government which derives all its powers directly or indirectly from the great body of the people ... It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it ... It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; ... otherwise every government in the United States ... would be degraded from the republican character." (P. 251.) "Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility

... and in its express guaranty of the republican form to each of the [State governments]." (P. 253.)

Madison, in *The Federalist* No. 43, pp. 290-291, discussing the Guarantee Clause, wrote: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic ... innovations. ... [W]here else could the remedy be deposited, than where it is deposited by the Constitution? It may possibly be asked, what need there could be of such a precaution ... But who can say what experiments may be produced by the ambition of enterprising leaders ... ? [I]t may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority."

If states fail to conform to the republican form by providing fair and effective representation for the people, the Court is "bound to pursue the [constitutional] authority", which is the "express guaranty of the republican form".

The government itself, state and federal, must be derived from the people, and not from a "favored class" of it. The federal government has the right to defend the system against "aristocratic innovations" and "the ambition of enterprising leaders". Gerrymandering is an "aristocratic innovation" in which government is derived from a favored class by their dilution of the political power of the people. Career politicians, ruthless in their ambitious and self-interested pursuit of continued office and accumulation of related perquisites, are the modern-day equivalent of aristocrats.

Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 297, wrote that the case was "in effect, a Guarantee Clause claim masquerading under a different label." At 301, he adds: "Certainly, 'equal protection' is no more secure a foundation for judicial judgement of the permissibility of varying forms of representative government than is 'Republican Form'. ... This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably

republican state. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed. To divorce 'equal protection' from 'Republican Form' is to talk about half a question." And he states further, at 323: "Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself."

Justice Harlan, in *Reynolds v. Sims*, 377 U.S. at 591, referring to the Court's application of the Fourteenth Amendment, writes that "[I]t can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause ..."

Referring to the *Luther v. Borden* opinion (7 How. 1) that held the Guarantee Clause nonjusticiable because it involved "political questions"[20], Judge Bork wrote: "Since then, for no very good reason, the Court has held that it may not enforce the clause under any circumstances."[21] Regarding

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[20]Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 297, note 30, indicates that *Luther* was a partisan political question. He seems to be limiting political questions to those that are partisan, referring again to "partisan politics" at 302 *(ibid.)*. Also, see his opinion in *Colegrove v. Green*, 328 U. S. at 550-556.

[21]Bork, *The Tempting of America, op. cit.*, pp. 85-86. "Federal courts should be loath to read out of the Constitution as *judicially* nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism." 292 F. Supp. at 985. Justice Douglas wrote, in *Baker v. Carr*, 369 U. S. at 242 (note 2): "The statement in *Luther v. Borden* ... that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable." Also, see Arthur E. Bonfield, "The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude", *Minnesota Law Review*, Vol. 46, 1962, p. 523; John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980), pp. 118-125; and 730 F. Supp. at 234-237.

Is it conceivable that *Luther* (1849) and *Dred Scott* (1857) share a common

Baker v. Carr, he wrote: "The most obviously relevant clause of the Constitution was article IV, section 4 ...[; it] was a case in which the guarantee clause should have been applied precisely because a situation in which the majority is systematically prevented from governing [or a minority's impact on governing is systematically diluted] is not what the Founders meant by a republican form of government."[22]

Chief Justice Warren, in *Reynolds v. Sims*, 377 U.S. at 582, states that "[S]ome questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." This statement clearly implies that, if there are judicially manageable standards, the Guarantee Clause is operative and questions raised under it are justiciable if not "political" in nature. Judicially manageable standards are available to prevent gerrymandering as a violation of the Guarantee Clause. [See Part VI and Appendix A of this brief, *infra*.] And the term "political" must be defined: The Constitution is intrinsically a "political" document, thus every constitutional issue is ultimately a "political" question. A distinction must be made between "political" and "partisan". As disdained as partisan political parties were at the writing of the Constitution, it would be impossible to construe any

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genesis - an illegitimate motivation to effectively nullify any constitutional provisions which could potentially be used to justify federal intervention into the internal affairs ("political questions") of the states? This was not an unusual context for the Guarantee Clause. During debates on the admission of Missouri to the Union (1818-1821), abolitionists in Congress cited the Guarantee Clause as empowering or obligating Congress to prohibit slavery in Missouri, since "the existence of slavery in any state is ... a departure from republican principles." Bonfield, *op. cit.*, pp. 531-532.

[22]Bork, *The Tempting of America*, *op. cit.*, pp. 85-86. Justice Douglas wrote, in *Baker v. Carr*, 369 U. S. at 242: "[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution." Also, see 292 F. Supp. at 984-985.

original constitutional protections or standing for them *per se*. Inter-party conflicts are in fact partisan political questions which should be nonjusticiable (thus, *Davis v. Bandemer* was decided on the wrong basis - *i.e.*, that political parties were harmed, not that the people and their interests were not properly represented).

Justice Brennan, in *Baker v. Carr*, 369 U. S. at 222 (note 4), referring to *Luther v. Borden*, concedes: "[T]he Court plainly implied that the political question barrier was no absolute ..." Justice Frankfurter, *ibid.* at 283-284, warns: "The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic ..."

The motivation for the one person, one vote rulings of the Court is a concept of substantive equality, an equal weight for each vote. Such a principle would derive more support from a democratic system of government than from republican government. The word "democracy" is not in the Constitution and is mentioned only negatively in *The Federalist*. Ironically, in the name of equally-weighted individual votes, politicians were relieved of any constraints on gerrymandering, and the counter-effect has been the diminution of the value and effectiveness of those votes. Basing these cases on the Guarantee Clause would have assured the value of votes through fair and effective representation, achievable in a republic, which would have incorporated substantially equal-weighting of votes as well. Although the one person, one vote rulings, reflecting concern for individual rights, find their roots in democratic theory, the irony is that individual rights have greater protection in a republic. Madison, *in The Federalist* No. 10, p. 59, stated that, as opposed to a republic, in "a pure democracy ... there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."

First Amendment

Gerrymandering, in discriminating against identifiable groups, violates the First Amendment by abridging their

freedom of speech and associational rights through fragmentation of communities of interest. Gerrymandering denies individual voters their right to affect the political process by joining with others in the same community to elect representatives for their like interests. Since gerrymandering is an act of state government, a violation of strict governmental neutrality, it produces an unconstitutional interference with the political process, manipulated to unfairly favor or disfavor certain political interests. In effect, it promotes some political speech while muting other, and the broad range of local political activities is stifled or thwarted for affected groups. See Justice Harlan's comments in *N.A.A.C.P. v. Alabama*, 357 U. S. at 460-461.

Justice Black in *Williams v. Rhodes*, 393 U. S. at 30, wrote: "[T]he state laws place burdens on two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled to the same protection from infringement by the States." [Notes omitted.]

Justice Douglas, *ibid.* at 38-39, wrote: "[T]he right to vote - a 'fundamental political right' ... is 'preservative of all rights.' The right of expression and assembly may be 'illusory if the right to vote is undermined'. ... The Equal Protection Clause ... [which] bans any 'invidious discrimination' ... protects voting rights and political groups, as well as economic units, racial communities, and other entities. ... Cumbersome election machinery [as created by gerrymandering] can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." [References omitted.]

Article I, Section 2

Article I, Section 2, which states that "[t]he House of Representatives shall be composed of members chosen ... by the People", is violated by a state legislature which in effect chooses the members of Congress and its own members by means of gerrymandering district lines. Gerrymandering deprives the people of the political power and right to constitute their own legislature, to choose fair and effective representation for their communities of interest.

In *Wesberry v. Sanders*, 376 U. S. 1, Article I, Section 2 was the constitutional basis for one person, one vote mandates in drawing lines for congressional districts. However, in the opinion of the Court, written by Justice Black, at 17-18, Article I, Section 2 also had broader relevance: "It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to have their votes counted. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, ... or diluted by stuffing of the ballot box ..." [References omitted.] In *Colegrove v. Green*, 328 U. S. at 570-571, Justice Black wrote: "The policy is that which is laid down by all the constitutional provisions regulating the election of members of the House of Representatives, including Article I which guarantees the right to vote and to have that vote effectively counted: All groups, classes, and individuals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people." (Also, see 781 F. Supp. at 401-410.)

VI.

If gerrymandering is declared unconstitutional *per se*, then two questions follow: (1) Who will be responsible for the redistricting process?; (2) How will gerrymandering be precluded?

To the first question, the Court has consistently and

appropriately held that redistricting is a political process which is the responsibility of the state legislatures under Article I, Section 4 of the Constitution. The unconstitutionality of gerrymandering would not change this responsibility.

The issue is not whether redistricting should be a political process or whether it should be the duty of state legislatures. Rather, the issue is simply that the process must be fair, that it must honor the right of the people to fair and effective representation.

Redistricting is a political process, but it does not have to be, nor should it be, a partisan political process, just as it was a non-partisan process at the creation of our republic. Because of its political impact, the process must be as neutral as possible, protecting the interests of the people. Redistricting should be analogous to reapportionment; reapportionment of representation between the states is a purely neutral process in execution, although it has very substantial political consequences.

The importance of the role of the state legislatures in redistricting has been significantly compromised and diminished over the last several decades. Because of the failure of the legislatures to comply with constitutional standards, deliberately or inadvertently, the judicial system has become heavily involved in the process. Nearly half of the current congressional districts have been impacted by court order, not even including the districting changes forced by the Justice Department under the Voting Rights Act. Additionally, there has been a continuing importunate encroachment by federal representatives in the redistricting process.

This sweeping engagement of the courts heightens the risk of jeopardizing the neutrality of the judiciary, or even of its corruption, perceived or actual, through politicization. There are some disturbing indications that this eventuality may have

already begun.[23] It would be a sad day indeed for this republic if the same public cynicism and distrust of the legislatures should ever be extended to the judiciary. Conversely, a decision by the Court to ban gerrymandering would be widely hailed as a restoration of fairness to the political system, enhancing the Court's public esteem.

The encroachment of federal representatives into the workings of the state legislatures also has disturbing aspects of conflicts of interest. Federal legislators have vested interests in perpetuating gerrymandering as direct beneficiaries, and are often co-conspirators in its planning and implementation as well.[24]

If appropriate neutral standards in the redistricting process were followed, there could be a full and untrammeled resumption of the function by state legislatures, where it belongs, without outside pressures or intervention.

To the second question then, gerrymandering can be precluded by the conscientious adherence of state legislatures to judicially manageable standards, such as the proposed model standards for redistricting in Appendix A *infra*. The Court could stipulate that the preparation of redistricting plans in compliance with the proposed (or substantially similar)

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[23]See *Baker v. Carr*, 369 U. S. at 324-325, note 148; Quinn, *op. cit.*, pp. 62-79, 106-113, and 123-126 of the section "All Passion Spent: California's 1981-1984 Reapportionment"; *Badham v. Eu*, 488 U. S. 1024, Appellants' Brief to the U. S. Supreme Court, No. 87-1818 (May 4, 1988), note 1, pp. 3-4; Gordon E. Baker, "Lessons from the 1973 California Masters' Plan", *Political Gerrymandering and the Courts*, Bernard Grofman, ed. (Agathon Press, 1990), pp. 308-309; Bernard Grofman, "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing'?", *Cardozo Law Review*, April 1993, Vol. 14, at 1253-1254 (with related notes); and footnote 13 *supra*.

[24]See Quinn, *op. cit.* (particularly, the section "All Passion Spent: California's 1981-1984 Reapportionment"). Also, see 781 F. Supp. at 408-409.

redistricting standards would establish a strong *prima facie* presumption that the plans provided fair and effective representation for the people as required by the Constitution. A substantial burden of proof would be required for plaintiffs to overcome this presumption.

The proposed standards *infra* do not comprise an abstruse political theorem or quixotic ideal divorced from reality, but are field-tested - practical and proven with real-world applications. In the 1970 and 1990 census cycles, due to fortuitous stalemates caused by split control of the state government in California, the state Supreme Court appointed special masters to draw the district lines. Both plans, using near-identical criteria, were based on communities of interest.[25] California has the largest population of any state in the Union, is the third largest in size, and is the most geographically, demographically, and economically diverse, with the most pluralistic society. If these judicially manageable standards can make it there, they can make it anywhere.

The proposed standards also follow closely Justice Stevens' criteria, both procedural and delineational, as discussed throughout his opinion in *Karcher v. Daggett*, 462 U. S. at 744-765. For example, the proposed procedural standards are elaborations of the broad procedural criteria suggested by Justice Stevens (at 759): neutral decision makers, use of neutral criteria, opportunity for input of outside viewpoints, and explanation of guidelines. Justice Powell, in *Davis v. Bandemer*, 478 U.S. at 164-178, restates the same delineation criteria noted by Justice Stevens in *Karcher*.

With judicially manageable standards, redistricting plans, in effect, would be self-evaluated. Currently, judicial

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[25]See *Legislature of State of California v. Reinecke*, 110 Cal. Rptr. 718, and *Wilson v. Eu*, 4 Cal. Rptr. 2d 379. Also, see Quinn, *op. cit.*, pp. 58-75 of the section "Endless Stalemate: California's 1971-1973 Reapportionment". For a recent evaluation of the 1973 plan, see Baker, "Lessons ...", *op. cit.*, p. 296.

reviews are uncertain and always after the fact when plans are challenged in the courts. The damage has already been done to fair and effective representation and democratic institutions for years, often nearly through the decade. As has been said, justice delayed is justice denied.

Gordon E. Baker wrote: "Tortuously shaped districts ... have become the hallmark of gerrymandering because they offend the sense of fair play and the desire for representing some approximation of communities of interest. ... [T]he political branches [could] correct inequities for judicial review, following general guidelines laid down by the Court- for example, proper procedures (public hearings, broad consultation, official justifications of districting plans), adhering to local subdivision boundaries whenever practicable, following traditional (and, often, state constitutional) criteria designed to protect the integrity of geographic regions and communities. ... Those who would leave the problem to the give-and-take of the political process overlook the fact that the process itself often resembles a monopoly more than a free market ... A generation ago the problem of malapportionment in the form of vast population disparities among districts was virtually immune from political remedies for much the same reasons. Until the remaining form of vote dilution is also checked by the judiciary, the reapportionment revolution will remain unfinished."[26] [Emphasis added.]

Following neutral standards of redistricting for fair and effective representation that apply equally to all groups would provide a principled resolution to most collateral issues relating to districting and the electoral system. See Appendix B *infra*. A decision to declare gerrymandering unconstitutional *per se* would not be a reversal of previous "apportionment" and related voting rights decisions - it would transcend them as a fulfillment of their promise and hope of

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[26]Baker, "The Unfinished Reapportionment Revolution", *op. cit.*, pp. 24-25.

fair and effective representation for the people.

VII.

Chief Justice Warren, in *Reynolds v. Sims*, 377 U. S. at 565-566, captured the essence of this issue with his statement that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment".[27] This ideal of democratic representation could be realized through the Court's declaration that gerrymandering is unconstitutional *per se*, providing judicially manageable standards, which, if followed, would establish a *prima facie* presumption of constitutionality. This straightforward finding would resolve not only the contentious matter of gerrymandering, but would also resolve or mitigate several related issues, as discussed in Appendix B *infra*.

The first three words of the Constitution, **WE THE PEOPLE**, were not writ large without purpose or reason - they were a graphic expression of the pre-eminence of the people in the republic being founded. It is not possible to overestimate the depth of these feelings.[28] Lincoln, in his immortal Gettysburg Address, said that our republic was a "government of the people, by the people, for the people".

It is evident that the people are the supreme authority in our political system and that their common interests take precedence over all others, with no deference given to those contrary. Hamilton wrote (*ibid.* No. 59, pp. 400-401) that there is "an obvious distinction between the interest of the people in the public felicity, and the interest of their local rulers in the power and consequence of their offices ... [who are] stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement ... The scheme of separate confederacies which will always multiply the chances of

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[27]See Grofman, *op. cit.*, at 1262, note 102.

[28]See Madison, *The Federalist* No. 45, p. 307 and Hamilton, *op. cit.*, No. 22, p. 144.

ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal. ... [The Union's] preservation therefore ought in no case that can be avoided to be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust."

The diminution, in any manner, of the right to vote strikes at the very heart of republican principles, the constitutional foundation upon which our government is established. The Declaration of Independence stated that "the right of Representation in the Legislature [is] a right inestimable to [the people]". The Court, "bound to pursue [the constitutional] authority", has within its power to restore the right of representation in its full scope to the people, reinvigorating the political process with a renewal of fairness, legitimacy, integrity, and honor.

Democracy, with its sweet winds of freedom, is now sweeping the world, without parallel, such as none would have dared dream only a few years ago. Although relatively young in the family of nations, America has been a lodestar, "the world's best hope",[29] its oldest representative democracy. At a time when the emerging fragile democracies of the world are looking to our political system for hope, guidance, and inspiration, can we do less than what is just and right? "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us."[30]

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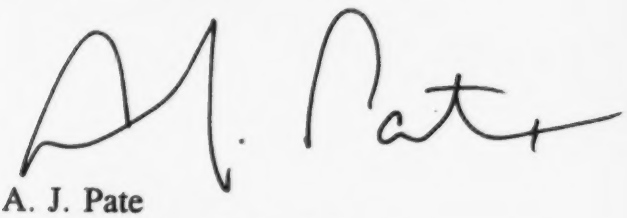
[29]Jefferson's First Inaugural Address, March 4, 1801. *The Writings of Thomas Jefferson*, Saul K. Padover, ed. (The Easton Press, 1967), p. 272.

[30]From a sermon delivered by John Winthrop, first governor of the Massachusetts Bay Colony, in 1630 aboard the *Arbella* enroute to America; Robert C. Winthrop, *Life and Letters of John Winthrop*, Vol. II (Ticknor and Fields, 1867), p. 19. These prophetic words have been fulfilled literally.

Respectfully submitted,



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APPENDIX A

PROPOSED MODEL STANDARDS FOR REDISTRICTING

Procedural Standards

1. The state legislature should appoint a joint redistricting committee, composed of equal numbers of legislators from each major political party to draw the congressional and state legislative districts; a caucus of all legislators from each political party will select their own party's representatives to the committee. The number of committee members should be the minimum sufficient to adequately perform the task, not exceeding ten members. To the extent practicable, the major geographical areas in the state and major minority groups protected under the Voting Rights Act should be represented on the committee.

2. To avoid potential conflicts of interest, all committee members would be barred, as a condition of service, from seeking office in the first election held in a congressional district drawn by a redistricting committee of which the legislator was a member. For example, members of the redistricting committee which drew a plan in 1991 would be barred from seeking election as a U. S. congressman in 1992, but would be eligible thereafter; they would not be barred from other state elections.

3. Before drawing a preliminary plan, public hearings should be held in major cities in appropriate geographic areas of a state to invite public participation in identifying significant communities of interest. The public should be provided explanations of the delineation standards to be used.

4. The committee should produce preliminary plans following the delineation standards (*infra*), then hold additional public hearings, which may be in a single location

(either in a central city or the state capital), before presenting final plans to the state legislature. These preliminary plans should be made available to the media statewide prior to the public hearings.

5. For both preliminary and final plans, the committee must make adequate and appropriate provision for public dissemination of the rationale or other explanation for all districts, particularly regarding the communities of interest encompassed therein. The complexity of the explanations will generally be in inverse proportion to their fairness, *i.e.*, the simpler, the fairer (*veritas simplex oratio est*).

6. Redistricting plans may be submitted at all hearings by the public or other interested parties for consideration by the committee. These plans must meet the following criteria:

a. must be based on the federal census data;
b. must present a complete plan for the entire state for districts of a type;
c. must follow the delineation standards (*infra*); and
d. must provide full explanation and rationale for all districts drawn, particularly regarding communities of interest encompassed therein.

An exception may be made for informational submissions in which lines are drawn solely to identify boundaries of specific communities of interest, with or without regard to population factors. Such submissions, which may or may not be a complete plan, should be clearly labeled as for identification or information purposes only.

7. Adequate and appropriate public notice should be given prior to all hearings. Testimony not related solely to fairness in determining representation for communities of interest is not germane and will be given no consideration.

8. All official committee meetings should be open to the

public, with complete records (including videotape) kept of all proceedings. Census data, computer programs, and other related materials should be available to the media and the public at cost.

9. No favoritism or preferential treatment, either in receiving public testimony or plans, will be granted to officeholders, at any level of state or federal government, including committee members. All testimony or plans must be judged solely on their intrinsic merits.

10. The final plans prepared by the committee require only a simple majority for committee approval.

11. Although not required, final plans prepared by the committee may be submitted to the state legislature for approval, but amendments should require a three-fourths majority and may be justified only for further unifying of communities of interest. However, such plans, fairly drawn in good faith accordance with these standards (both procedural and delineation standards), should not be subject to veto by a governor.

12. Final plans must be completed by the committee within six months from the date of the release of final federal census data. If legislative approval is required, the legislature has thirty days to act after receipt of the plan from the committee, or the plan will become law automatically.

> [Six months should be more than sufficient. After all, despite the primitive transportation and communications of 1787, the Constitutional Convention took less than four months to complete the Constitution, the greatest political document in history!]

13. If for any reason, the process is not completely finalized

within the required time frame, all data collected by the committee will be submitted to the state supreme court which will appoint masters to complete the process within two months in accordance with the delineation standards (*infra*).

14. In states where the legislature has delegated responsibility for redistricting to extra-legislative bodies, such agencies should comply with these procedural standards (with exception of the first two) and all delineation standards (*infra*).

Delineation Standards

1. Districts must conform to constitutional standards of substantially equal population, based on total population as determined decennially by the Federal Census. Deviations from "ideal district population" may not exceed 5.0%± for congressional districts, nor 10.0%± for state districts. Ideal or average district population is calculated by dividing the total state population by the number of districts of a type to be drawn. The demonstrated purpose of such deviations must be the avoidance of dividing communities of interest or counties.

To optimize the opportunity for racial/ethnic minorities to select representatives of their choice, the districts in which they constitute a majority or have a significant numerical minority may contain total population near the lower limit within the permissible range, thus reducing dilution of their vote and providing some offset for the acknowledged undercount of minorities.

2. Districts should be drawn to achieve fair and effective representation for communities of interest (major groups of people with evident common interests). Communities of interest, although not circumscribable with absolute exactitude, are none the less real. These communities may

be based on social, economic, or geographic interests, such as agricultural areas, regions of industry, racial or ethnic communities, etc.

Districts must be drawn for any racial/ethnic minority comprising a community of interest which is geographically compact and has total population sufficient to constitute a majority in such a district; the same requirement should apply to the optimal extent possible for all other communities of interest as well.

Although their population may be insufficient to constitute even an effective "influence district", every practicable effort should be made to keep intact any discrete and insular communities of interest, which are readily identifiable.

> [*E.g.*, see *United Jewish Organizations v. Carey*, 430 U.S. at 181-182, where the Hasidic Jewish community was unnecessarily split between two districts, because of blind adherence (hooked on a "feeling") to a bureaucratic rule-of-thumb, in a triumph of form over substance at its most absurd.]

3. Districts must be composed of contiguous land masses with reasonable access between inhabited areas; however, non-contiguous land masses, separated by a body of water, may be included in the same congressional district if they are within the borders of the same county. No district line may cross any other district line of the same type. If population is insufficient for a separate district, islands should be incorporated into the same districts that contain the political units of which they are part.

4. Districts must be as functionally compact as practicable in encompassing communities of interest, considering transportation and communication links, as well as natural boundaries.

The measure of compactness is not subject to practical precision. However, the following standard will serve as a reasonable guideline to limit non-compactness: When enclosed within a circle, ellipse, or quadrangle (simple quadrilateral) of the shortest possible perimeter, the area of the district must occupy two-thirds or more of the total area enclosed. Certain exceptions may be made to this general rule, as follows:

a. A lower threshold of five-ninths may be used for districts in which no counties are divided, or for districts in which racial/ethnic minorities constitute a majority of the population.
b. For state border districts enclosed within any of the three geometric figures noted above, the area beyond state borders is not included in the equation.
c. For districts contained wholly within a county, the exception noted in "b" may also be applied to county borders.

5. Counties are the basic defining units in forming districts, and the integrity of their boundaries must be preserved to the fullest extent possible. Generally, counties should be divided between districts only when total population of the county exceeds the maximum allowable deviation from ideal district population.

City boundaries should be preserved to the extent practicable, but with lower priority than county lines, particularly at the margins where they are often irregular and/or sparsely-populated. When census tracts are not conterminous with city boundaries, census tracts control. City boundaries may be disregarded when necessary to avoid dividing compact racial/ethnic communities of interest.

Additional criteria must be followed:

a. In general, when considering existing boundaries of political subdivisions, the older the boundary, the more

weight to be given;

b. Lines from the same district cannot cross a common border between two counties more than twice; and

c. Only one district may cross a common border between two counties, except when a crossing line is also a common boundary between two districts (*i.e.*, two districts or more cannot separately cross the same common border).

6. No census tracts may be divided, except in very rare instances which must be fully explained.

7. All congressional and state districts should share common boundaries to the optimal extent possible, especially where there is mathematical symmetry. Congressional districts should be drawn first, and all else follows from those primary lines. For example, assume 30 congressional districts, 30 state senate districts, and 150 state house districts; the congressional and state senate districts should be identical (conterminous), and each congressional district should be subdivided into 5 state house districts ("nested").

8. Neither partisanship nor incumbency can be a consideration or factor under any circumstance. Since districts should be drawn for communities of interest, no consideration may be given to personal interests of any individual or of any group or special interest which is not discrete and insular.

9. Due to the special protections provided racial and ethnic minorities by the Constitution and current federal law, certain additional factors should be considered in conjunction with those mentioned elsewhere in these standards.

When possible, districts for racial/ethnic communities of interest should have a majority of the voting age population, rather than simply a majority of the total population. After

a majority of voting age population (50 to 55%) has been attained, usually with a 65 to 70% majority of total population, the district should not include additional persons of that minority; this is particularly applicable in multi-district metropolitan areas. However, in multi-county districts, the minority may also be part of broader communities of interest beyond race or ethnicity. For example, total population of a racial/ethnic community of interest may range in excess of 70% where that minority is a part of multiple communities of interest and has a substantial majority of population in a particular geographic region (*e.g.*, the Hispanics in south Texas); however, the creation of such districts must not result in a significant dilution of that minority's potential representation on a statewide basis, either in intent or effect.

When sharing a geographically-compact area and the population of each is insufficient for a majority in a separate district, two or more racial/ethnic communities of interest should be combined to form majority or influence districts if they have political affinity or cohesiveness.

10. These standards are interdependent and interrelated. Any conflicts between standards in their application must always be resolved in favor of the standard which, in a particular situation or circumstance, would provide the fairest treatment for affected communities of interest.

11. Any exceptions to these standards may be justified only as rectification of specific inequities or for further enhancement of communities of interest. A good faith effort to comply with the spirit of these standards is required. Any search for loopholes or seeking advantage through artificial or contrived conflicts between standards will be in bad faith, inimical to the best interests of the people.

APPENDIX B

COLLATERAL ISSUES AND RELATED DECISIONS

Population Equality of Districts

Justice Stevens, in *Karcher v. Daggett*, 462 U.S. at 753, wrote: "The major shortcoming of the numerical standard is its failure to take account of other relevant - indeed, more important - criteria relating to the fairness of group participation in the political process. To that extent, it may indeed be counterproductive." [Emphasis added.] Under the proposed standards *supra*, population equality between the districts becomes only one of a number of standards for fair and effective representation. Since the numerical standard would no longer be the sole criterion, permissible deviations from average district population could be relaxed to a more reasonable standard of substantial equality[1] (a "tolerance for reality"[2]), reconciling the principle of one person, one vote with the constitutional right of fair and effective representation.

The one person, one vote standard which evolved into a virtual zero-deviation requirement has been severely criticized and ridiculed. Much of that commentary has come from Justices on the Court. At the start, Justice Frankfurter, in *Baker v. Carr*, 369 U. S. at 268, warned of a "mathematical quagmire". Chief Justice Warren, in *Reynolds v. Sims*, 377 U. S. at 577, wrote: "Mathematical exactness or precision is hardly a workable constitutional requirement." Justice Harlan, in *Kirkpatrick v. Preisler*, 394 U. S. at 550-552,

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[1]Justice White, in *Kirkpatrick v. Preisler*, 394 U. S. at 553, referring to congressional districts, suggested: "As a rule of thumb, a variation between the largest and smallest district of no more than 10% to 15% [a 'trivial level'] would satisfy me ..."

[2]Justice Fortas, *Kirkpatrick v. Preisler*, 394 U. S. at 538.

wrote: "Marching to the nonexistent 'command of Art. I, § 2' of the Constitution, the Court now transforms a political slogan into a constitutional absolute. Straight indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote. ... [I]nsistence on mathematical perfection does not make sense even on its own terms. ... [T]he Court's exclusive concentration upon arithmetic blinds it to the realities of the political process ... The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. ... [T]he question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft." Justice White, in *Kirkpatrick v. Preisler*, 394 U. S. at 555, wrote: "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander ... I see little merit in such a confusion of priorities." The Court had strained at a gnat, and swallowed a gerrymander.

Zero population deviation is a *reductio ad absurdum*. There is no perfect census; even the Census Bureau has estimated that the total 1990 Census was undercounted by 2.1%, which was not evenly distributed, geographically or demographically. The census was changing even as it was being taken, through births, deaths, and migrations. Districting plans were not drawn until over a year or more after the census, and the first elections under the new plans were not held until two or more years after the census.

When the 1990 district populations by state were determined, there were very large initial deviations in district size, ranging from Wyoming with 453,588 to Montana with 799,065 (both single district states), a variation of 76%; compared to the ideal district population, based on the national average of 572,466, this is a total variance of 60%.

Populations are not static, so there are dramatic shifts

ongoing throughout the decade, both within and between states. From the 1980 Census to the 1990 Census, the total U. S. population increased by almost 10%, which was not evenly distributed, geographically or demographically (*e.g.*, Nevada increased by 50% and West Virginia decreased by 8%). Individual congressional districts had even larger shifts, ranging from an increase of 86% in California District 37 to a decrease of 23% in Michigan District 13. Even within the same state, Texas had a deviation range of 85%, from a 70% increase in District 26 to a 15% decrease in District 18.

All the above data are based on the count of total population, which is appropriate according to the Fourteenth Amendment, Section 2 ("counting the whole number of persons"). However, if the goal of the Court was an absolutely equally-weighted individual vote,[3] then this was arguably the worst basis to use; more logical bases would have been registered voters, voting age population of citizens only, total voting age population, or total citizens. However, voter equality is an impossible and unattainable goal in a republican form of government. For votes to be truly equal in weight, there would have to be an exactly equal turnout of voters in every district in every election. Of course, this is beyond credibility.

The Court has placed an inordinate reliance on such an illogically simplistic and internally contradictory standard. Zero deviation is certainly a bright line - but from where to where? Shifting sand does not make a good foundation for a constitutional standard. How can such precise law be established on such imprecision?

Justice Powell, in *Davis v. Bandemer*, 478 U. S. at 168, wrote: "A standard that judges the constitutionality of a districting plan solely by reference to the doctrine of 'one person, one vote' may cause two detrimental results. First,

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[3]See generally, Jonathan Willis Still, "Voter Equality in Electoral Systems" (unpublished Ph. D. dissertation, Department of Political Science, Yale University, May 1977), especially pp. 113-131.

as a perceived way to avoid litigation, legislative bodies may place undue emphasis on mathematical exactitude, subordinating or ignoring entirely other criteria that bear directly on the fairness of redistricting. Second, as this case illustrates, and as *Reynolds v. Sims* anticipated, exclusive or primary reliance on 'one person, one vote' can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering." [Notes and references omitted.] The warnings of Justice Powell and others have unfortunately been fully realized; extreme adherence to zero deviation has led inexorably to extreme gerrymandering (*summum ius summa iniuria*).

Although Justices have indicated in several decisions that wider variances may be acceptable in conjunction with other neutral criteria,[4] these open invitations have been disdainfully ignored by the legislatures because they delight in exploiting the zero deviation rule which allows them to put a glossy (though very thin) constitutional veneer of legitimacy over their dirty little game of gerrymandering. To avoid reversals, the lower courts have also accepted the status quo, largely due to the failure of the Court to give any direction by laying down appropriate guidelines.

Partisan Gerrymandering / Proportional Representation

In *Davis v. Bandemer*, 478 U. S. 2797, the Court held that "political" (*i.e.*, partisan) gerrymandering[5] under certain

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[4] *E. g.*, 377 U. S. at 578-581 and 462 U. S. at 780-782, 848, and 852. Even Justice Brennan, the most rigid advocate of zero deviation ("precise mathematical equality"), suggested some exceptions in *Karcher v. Daggett*, 462 U. S. at 740 (also see note 6 at 734).

[5] "Political" gerrymandering is a redundant term. All gerrymandering is political, falling into two basic categories - racial/ethnic and partisan. Each has sub-categories: racial/ethnic gerrymandering may be affirmative

conditions may violate the Equal Protection Clause of the Fourteenth Amendment.[6] This decision, virtually self-nullifying, has had absolutely no impact on gerrymandering, which has only grown more extreme in the 1990 cycle. In the seven years following this decision, the Court has not decided a single case under its precedent.

Partisan gerrymandering would no longer be a distinguishable issue, if gerrymandering is declared unconstitutional *per se* and the Court obliges state legislatures to provide fair and effective representation through use of neutral standards. Gerrymandering is not unconstitutional because of the uncertain harm it does to political parties, but because of the real and immediate harm done to the people and their communities of interest. The identification of gerrymanders *per se* is relatively easy and immediate when based on objective standards (such as the proposed standards *supra*), while the identification of "unconstitutional" partisan gerrymanders is very complex and prolonged using highly subjective and ill-defined standards.

Justice O'Connor, in *Davis v. Bandemer*, 478 U. S. at 144, clearly and correctly identified the issue: "I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question..." [Emphasis added.] It is historically evident that political parties as such were intended no provision in the Constitution - it is the interests of the people which are always paramount. *Davis v. Bandemer* focused on cause and intent, which without question were motivated by partisan interests, but identified the wrong effect. The constitutional violation was the

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or negative, and partisan gerrymandering may be unilateral or bilateral. Often racial/ethnic gerrymandering, in either sub-category, may have partisan overtones as well.

[6]This decision in effect says that political parties have constitutional protections that the people in their communities of interest do not have - which cannot be what the Framers of the Constitution intended.

arbitrary fragmentation of communities of interest, for whatever reason, thereby diluting their votes and depriving them of fair and effective representation. This effect was determinable on the face of the map without need for a results test based on several subsequent elections as required to "prove" a partisan gerrymander.

The results test for partisan (and racial/ethnic as well) gerrymandering raises serious apprehensions of an eventual evolvement to proportional representation. Justice O'Connor (*ibid.*, at 145) warned: "It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate. ... [I do not] believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions, or our political institutions."

The use of neutral, primarily qualitative, districting standards will preclude proportional representation because there would be no results test, prospectively or retroactively. The districts simply would be drawn as fairly as possible in a neutral process, optimizing representation or political influence for as many discrete, insular, and identifiable groups as feasible; then the people would be free to choose whom they will to represent their common interests.

As Justice O'Connor (*ibid.*, at 147) wrote: "[N]o group right to an equal [or proportionate] share of political power was ever intended by the Framers of the Fourteenth Amendment." But what is granted by the Constitution is the right of the people, from whom the "government derives all its power", to fair and effective representation for "the permanent and aggregate interests of the community". The right guaranteed is not based on the results of elections, rather it is based on the procedural fairness of the process which determines the value and effectiveness of the vote and the legitimacy of the representation so chosen.

By declaring gerrymandering unconsitutional *per se* based on neutral standards, the Court will have disengaged itself from the partisan political issues which are obviously inherent in deciding any partisan gerrymandering case. As Justice Frankfurter warned in *Baker v. Carr*, 369 U. S. at 267: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself in the clash of political forces in political settlements."

Creation of Majority and Influence Districts for Racial/Ethnic Minorities

The use of the proposed standards *supra* would obviate most of the voting discrimination complaints of racial/ethnic minorities, which the Voting Rights Act was intended to resolve, with the principal exception of those related to multi-member districts.

In *Thornburg v. Gingles*, 478 U. S. at 50-51, which dealt with multi-member districts but presumably would apply as well to single-member districts,[7] the Court established three "necessary preconditions" for a threshold proof for a racial/ethnic minority that "districts operate to impair [its] ability to elect representatives of their choice": "First, ... must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a ... district[;] ... [s]econd, ... must be able to show that it is politically cohesive[;] ... [t]hird, ... must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

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[7]See Opinion of the Court by Justice O'Connor, *Shaw v. Reno*, ___ U. S. ___, 113 S.Ct. at 2831.

Under the proposed standards, the first precondition of *Thornburg* is the only requirement that would need to be met to warrant a district being drawn for a racial/ethnic community of interest, which is the same neutral requirement for all other communities of interest.[8] It would not be necessary for a minority to have to establish the second and third preconditions. Indeed, the proposed standards also go beyond the bare requirements of the Voting Rights Act by the establishment of influence districts where practicable for racial/ethnic minorities and all other applicable groups.[9]

Racial/ethnic minorities have been used shamelessly as pawns by both political parties for purely partisan reasons. The most common form in past cycles was a negative gerrymander, the fragmentation of racial/ethnic communities of interest to maximize Democratic Party control of districts for the protection of white incumbents. In the current cycle, there has been a new phenomenon, affirmative gerrymandering (the most extreme form of gerrymandering yet seen[10]), which fragments non-minority communities of interest to maximize minority districts. What results is simply an agglomeration of a particular minority, which in no sense could be construed as a community itself, yet which by its creation denies the constitutional right of fair and effective representation to its adjoining communities of interest.[11]

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[8]See 808 F. Supp. at 475, citing Justice White in *United Jewish Organizations v. Carey*, 430 U. S. at 168.

[9]See Grofman, *op. cit.*, at 1259, note 86.

[10]See George F. Will, *Restoration* (The Free Press, 1992), pp. 41-50.

[11]"[A] district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representatives could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representatives could not easily tell who actually lived within the district. Also of importance, of course, is the compactness

This tactic has been strongly aided and abetted by the Republican Party, principally in the hope of depriving white Democratic incumbents of the minority vote, thus making them more vulnerable to defeat.[12] Under the affirmative version, minorities at least get more direct representation, but at a high cost to the integrity of the political system and to non-minority communities of interest.[13] This cynical manipulation of racial/ethnic minorities, as dehumanized votes ("faceless numbers") to be shifted about at will for personal and/or partisan political purposes,[14] is demeaning both to the minorities and to the very process itself.

Justice Stevens, in *Rogers v. Lodge*, 458 U. S. at 651-652, wrote: "Racial consciousness and racial association are not desirable features of our policial system. We all look forward to the day when race *is* an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a 'bloc'. In this respect, racial groups are like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the

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of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met." 686 F. Supp. at 1466.

[12]See Grofman, *op. cit.*, at p. 1251.

[13]Such extreme actions may also be detrimental to the best interests of the minority; see 899 F. 2d at 1038-1039.

[14]See Justice White, *Shaw v. Reno*, ___ U. S. ___, 113 S. Ct. at 2841-2842, note 10.

eyes of the law. Such a rule would delay - rather than advance - the goal advocated by Justice Douglas: 'When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal it should find no footing here. '*Wright v. Rockefeller*, 376 U. S. 52, 67 ... '" [Emphasis in original.] Also, see 740 F. Supp. at 625-626, part IV.

Fair and effective minority representation determined by a neutral process is an issue which needs to be resolved definitively and decisively. Much mischief and harm in terms of racial/ethnic divisiveness and antagonisms have already been done. But there is potential for even greater mischief to our republican form of government and further ripping of the social fabric if this issue continues to drift irresolutely.

Retrogression of Racial/Ethnic Minority Districts

Under Section 5 of the Voting Rights Act, for certain covered jurisdictions, any proposed electoral changes, including redistricting, must be precleared by specified means. The purpose of such preclearance is to assure that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or language]".

The Court has developed a retrogression test to measure the effects of such changes. Justice Stewart, in the Opinion of the Court, *Beer v. United States*, 425 U. S. at 141, wrote: "[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

Although neither the statutory language nor the Court so

states, this effects test is sometimes construed to be an absolute rule against a decline in potential minority representation[15] (*i.e.*, once a minority-majority district has been created, it can never cease to exist). This fallacy has been used to justify extreme and preposterous gerrymanders.[16] Under the proposed neutral standards *supra*, redistricting for minority interests will meet both the greater constitutional protections of the Fourteenth Amendment and the statutory requirements of the Voting Rights Act.[17] They provide a neutral rationale for the eventuality of a decline in potential minority representation. Minorities may lose their majority status in a district (or geographic area) due to substantial emigration of their members into the majority community or other communities of interest or by the immigration into the district of members of other communities of interest, often a different minority.

Such declines are a reality. In the decade concluding with the 1990 Census, the four congressional districts which lost the most population were all represented by blacks; of the districts losing 10% population or more during the decade, ten out of fourteen (over 70%) had black representatives.

These migrations may be a democratic trend toward

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[15]Concerning the difficulty in making such a determination, see Justice Marshall's comments in *Beer v. United States*, 425 U. S. at 153, note 12.

[16]See the Opinion of the Court by Justice O'Connor, *Shaw v. Reno*, ___ U. S. ___, 113 S. Ct. at 2831. In Title 28 of the Code of Federal Regulations (7-1-92 Edition), Part 51, p. 822, the Procedures for the Administration of Section 5 of the Voting Rights Act include among factors to be considered by the Attorney General the following: Sec. 51.59(f) "The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries."

[17]See Justice Marshall's opinion (part I, section B), 425 U. S. at 156-158.

increasing assimilation. The political goal of a pluralistic society should be that particular racial/ethnic interests ultimately become indistinguishable from those interests shared with other members of their community.

Other Issues

The impact of the proposed standards *supra* on two other peripheral issues should be noted - incumbency and competitive districts - although these are partisan political questions, neither of constitutional concern except to the extent by which the political process is unfairly distorted to assure or attempt to assure non-competitive districts or the continued reelection of incumbents.[18] Constitutional issues should be based on principles and standards more enduring than transitory partisan loyalties.

Communities of interest evolve slowly, if at all. The long-term effect of adherence to neutral districting standards would be relatively stable district lines, at least at the core. Future population shifts would generally require adjustments only at the margins, contrasted to the current wildly-polymorphic boundaries from decade to decade. Ironically, though the proposed standards disregard incumbency, this stability should benefit incumbents, at least in terms of residency; it should be a very rare event when two incumbents were paired in the same new district, other than when the total number of districts of a type are being reduced.

The requirement of the proposed standards for the optimal use of conterminous boundaries and nesting of different types

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[18]It is ironic that the Court's decisions have had the unintended consequence of establishing a *de facto* safe harbor rule for incumbents (effectively creating a right to tenured office) through unrestricted gerrymandering and an acceptance of incumbency-protection as a justifiable state policy, contrary to the interests of the people, while an outraged electorate is fueling a rapidly growing grass roots effort to limit terms in Congress and other elective offices. See generally Will, *op. cit.*

of districts should increase upward mobility of politicians and thus competitiveness ("the rivalship of power"[19]). Coherent functionally-compact districts are certainly more capable of becoming competitive than fragmented artificial districts. Elections will be considerably more responsive to broad political shifts within communities of interest.[20] Representation will be enhanced by competition over who will best represent the interests of the community; whether inter-party or intra-party is of no constitutional consequence.

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[19]Hamilton, *The Federalist* No. 84, pp. 579-580. The inference could be drawn that the benefits of conterminous or nested districts were anticipated, based on the assumption that counties would be the basic unit for districting.

[20]See Baker, "Lessons ...", *op. cit.*, pp. 302-305, and Quinn, *op. cit.*, pp. 62-75 of the section "Endless Stalemate: California's 1971-1973 Reapportionment".